S. HRG. 101-759

TO PROHIBIT CERTAIN UNFAIR METHODS OF COMPETITION

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 114

A BILL TO DECLARE CERTAIN ACTIVITIES OF MANUFACTURERS OF SOFT DRINKS TO BE UNFAIR ACTS OR PRACTICES FOR PURPOSES OF THE FEDERAL TRADE COMMISSION ACT

FEBRUARY 20, 1990

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TO PROHIBIT CERTAIN UNFAIR METHODS OF COMPETITION—S. 114

TUESDAY, FEBRUARY 20, 1990

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES
AND BUSINESS RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howard Metzenbaum (chairman of the subcommittee) presiding.

Present: Senators Metzenbaum and Specter.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. This hearing will come to order. Today's hearing focuses on certain practices of soft drink manufacturers and their effect on competition. Senator Inouye has introduced legislation to prohibit certain unfair methods of competition, such as equipment giveaways. I commend Senator Inouye for his leadership on this issue.

It is now clear that there will be no truce in the cola wars. Coke and Pepsi continue to bombard the American consumer with media blitz after media blitz. Some might say that this competition has gotten out of hand.

Today, we will hear testimony about one practice that may be outside the bounds of fair competition. In an effort to block out other products, Coke and Pepsi now offer restaurants and other fountain customers dispensing equipment at little or no charge. They are going after smaller and smaller accounts that were historically serviced by small, independent equipment distributors. We will hear testimony today from several of these independent equipment distributors.

We will include in the record the balance of my statement which was not read in full, Senator Thurmond and Senator Inouye have statements for the record also.

Before I call the first panel I wish to place the text of S. 114 in the record.

[The statements and bill follow:]

U.S. Senator Howard M.
METZENBAUM
of Ohio

Committees:
Judiciary
Labor and Human Resources
Energy and Natural Resources
Select Committee on Intelligence

Chairmanships:
Subcommittee on Antitrust
Subcommittee on Labor
Subcommittee on Energy
Regulation and Conservation

OPENING STATEMENT
SENATOR HOWARD METZENBAUM
HEARING ON S. 114
BEFORE THE SENATE JUDICIARY COMMITTEE
ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS SUBCOMMITTEE
FEBRUARY 20, 1990, 10:00 A.M.

TODAY'S HEARING FOCUSES ON CERTAIN PRACTICES BY SOFT DRINK MANUFACTURERS AND THEIR EFFECT ON COMPETITION. SENATOR INOUYE HAS INTRODUCED LEGISLATION TO PROHIBIT CERTAIN UNFAIR METHODS OF COMPETITION, SUCH AS EQUIPMENT GIVE-AWAYS. I COMMEND SENATOR INOUYE FOR HIS LEADERSHIP ON THIS ISSUE.

IT IS NOW CLEAR THAT THERE WILL BE NO TRUCE IN "THE COLA WARS." COKE AND PEPSI CONTINUE TO BOMBARD THE AMERICAN CONSUMER WITH MEDIA BLITZ AFTER MEDIA BLITZ. THEY HAVE RECRUITED SPORTS STARS, FILM STARS AND ROCK STARS FOR ENDORSEMENTS -- ALL IN AN ATTEMPT TO CONVINCE CONSUMERS THAT THEIR PRODUCT IS "THE REAL THING".

SOME MIGHT SAY THAT THIS COMPETITION HAS GOTTEN OUT OF HAND. TODAY WE WILL HEAR TESTIMONY ABOUT ONE PRACTICE THAT MAY BE OUTSIDE THE BOUNDS OF FAIR COMPETITION. IN AN EFFORT TO BLOCK OUT OTHER PRODUCTS, COKE AND PEPSI NOW OFFER RESTAURANTS AND OTHER FOUNTAIN CUSTOMERS DISPENSING EQUIPMENT AT LITTLE OR NO CHARGE. THEY ARE GOING AFTER SMALLER AND SMALLER ACCOUNTS THAT WERE HISTORICALLY SERVICED BY SMALL, INDEPENDENT EQUIPMENT DISTRIBUTORS. THESE SMALL FIRMS USED TO COMPETE WITH COKE AND PEPSI TO SELL OR LEASE DISPENSING EQUIPMENT. BUT NOW THERE IS NO COMPETITION BECAUSE COKE AND PEPSI SIMPLY GIVE THE EQUIPMENT AWAY FOR FREE.

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS, SENATE JUDICIARY COMMITTEE, REFERENCE S. 114, A BILL TO DECLARE CERTAIN ACTIVITIES OF MANUFACTURERS OF SOFT DRINKS TO BE UNFAIR ACTS OR PRACTICES FOR PURPOSES OF THE FEDERAL TRADE COMMISSION ACT, 226 DIRKSEN SENATE OFFICE BUILDING. TUESDAY, FEBRUARY 20, 1990, 10:00 A.M.

MR. CHAIRMAN:

Our hearing today focuses on S. 114, a bill introduced by Senator Inouye, which makes it illegal under Section 5 of the Federal Trade Commission Act, for manufacturers of soft drink dispensing equipment or soft drink syrup, to engage in certain unfair activities in connection with the sale of soft drink syrup.

The hearing provides this Subcommittee with the opportunity to hear first-hand from some of the independent companies that supply the equipment and syrup necessary to dispense soft drinks to restaurants and fast food outlets, and to hear why they believe they have been injured in their businesses by the activities of the large soft drink manufacturers. We will also have the opportunity to hear from representatives of the soft drink association and the National Restaurant Association.

Mr. Chairman, I note that S. 114 has been jointly referred to the Judiciary Committee and to the Commerce Committee, and that the Commerce Committee will hold hearings on this matter in the very near future. Although I have an open mind on this legislation, I am concerned about amending the antitrust laws

to deal with a very specific practice in one industry. We should examine current antitrust laws -- the Sherman Act, the Clayton Act, and the Federal Trade Commission Act -- to see if they are adequate to deal with this problem. I look forward to hearing from the witnesses about why the antitrust laws need amending.

Mr. Chairman, I want to thank the witnesses for taking the time to appear before us today. I have received a large amount of correspondence about this problem, and I am pleased that we have been able to schedule this hearing.

STATEMENT

OF U.S. SENATOR DANIEL K. INOUYE

Mr. Chairman:

I wish to take this opportunity to thank your subcommittee for holding this hearing on S. 114, a bill I have sponsored that declares certain activities of soft drink manufacturers to be unfair for the purposes of section 5 of the Federal Trade Commission Act (codified at 15 U.S.C. 45 (1987)). This bill prohibits certain acts of any person engaged in the business of manufacturing, selling or distributing postmixed soft drink dispensing equipment, or engaged in the business of manufacturing, selling, bottling, or otherwise distributing soft drink syrup. These acts promote monopolization, hinder fair competition and will ultimately hurt the consumer.

Over the years independent soft drink distributors have served smaller outlets that large manufacturers did not serve. These distributors supplied the equipment and syrup necessary to dispense soft drinks at bars, restaurants and fast food outlets.

However, in their efforts to further monopolize the soft drink market, large soft drink manufacturers have started to provide, at little or no cost, beverage dispensing equipment to potentially large retail customers in order to lure them away from their current independent distributors. This creates an unspoken obligation on the part of the retail customer to purchase the soft drink syrup from the large soft drink manufacturer who is providing the equipment. Furthermore, when these large syrup manufacturers install the beverage dispensing equipment at no charge, it is usually equipped to dispense only the syrup flavors that the manufacturer produces. This leaves no room for the restaurant or tavern owner to dispense the soft drinks of a competitor.

The damaging impact on the beverage dispensing equipment industry is two-fold. First and most dramatically, it undermines the survival of those companies whose very existence is dependent upon the sale or lease of beverage dispensing equipment. When a larger seller of soft drinks, such as a fast food chain, is faced with a choice of buying or renting the beverage dispensing equipment or receiving it free of charge, there is little difficulty in making a decision. The result is always the same -- a member of the beverage dispensing equipment industry loses another customer. Secondly, once the equipment is installed, the customer invariably purchases its syrup directly and exclusively from the big soft drink manufacturer. Thus, the beverage dispensing equipment industry is not the only victim of this anti-competitive practice. Consumers and other distributors suffer as well.

Mr. Chairman, in the waning days of the 100th Congress, I had the privilege of chairing a hearing on this legislation in the Consumer Subcommittee of the Senate Commerce, Science and Transportation Committee. I heard testimony from numerous individuals who have been in the dispensing business for 20 to 30 years. Many now stand at the brink of losing their businesses. The large manufacturers gave no indication of compromising or coming up with a viable solution, saying only that this is common practice. Recently, I was contacted by an independent manufacturer who has lost five contracts just in the past three weeks, because of this practice.

In all candor, Mr. Chairman, unless action is taken to preserve what little competition remains in the fountain soft drink industry, these large manufacturers will totally eliminate competition and will decimate the beverage dispensing equipment industry. Currently, large manufacturers control 85 percent of the fountain syrup market, leaving 15 percent to all other manufacturers, including the other national brands. Less competition will inevitably be detrimental to the consumer in the long run.

I firmly believe that Congress must take a closer look into this matter. With both the Senate Judiciary and the Commerce, Science and Transportation Committees studying this issue, I believe a fair assessment of the situation can be made. It is my hope that the soft drink industry will work with both Committees to find a viable solution to this problem.

Again, thank you for agreeing to hold this hearing . I look forward to working closely with you and your Committee on this matter.

101ST CONGRESS
1ST SESSION

S. 114

To declare certain activities of manufacturers of soft drinks to be unfair acts or practices for purposes of the Federal Trade Commission Act.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 3), 1989

Mr. INOUYE introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JANUARY 31 (legislative day, JANUARY 3), 1989

Ordered referred jointly to the Committees on the Judiciary and Commerce, Science, and Transportation

---

A BILL

To declare certain activities of manufacturers of soft drinks to be unfair acts or practices for purposes of the Federal Trade Commission Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) it is an unfair act or practice, for purposes of section 5 of the Federal Trade Commission Act (15 U.S.C. 45), for any person engaged in the business of manufacturing, selling, or distributing postmixed soft drink dispensing equipment or engaged in the business of manufacturing, selling, bottling, or otherwise distributing soft drink syrup, to induce (directly or

indirectly or through an affiliate), using any of the means described in subsection (b), any retailer engaged in the sale of postmixed soft drinks to purchase any soft drink syrup from such person to the exclusion in whole or in part of soft drink syrup sold or offered for sale by other persons in interstate or foreign commerce, if—

(1) such inducement is made in the course of interstate or foreign commerce;

(2) such person engages in the practice of using any such means to such an extent as substantially to restrain or prevent transactions in any soft drink syrup in interstate or foreign commerce;

(3) a direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any soft drink syrup to such retailer in interstate or foreign commerce; or

(4) a direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from furnishing, leasing, selling, or servicing any postmixed soft drink dispensing equipment or postmixed soft drink dispensing equipment systems to such retailer in interstate or foreign commerce.

(b) The means of inducement referred to in subsection (a), with respect to a retailer, are—

(1) furnishing without consideration, giving, or lending any postmixed soft drink dispensing equipment, postmixed soft drink dispensing equipment systems, fixtures, signs, supplies, money, services, or other things of more than nominal value to the retailer;

(2) leasing or selling at below fair market value, any postmixed soft drink dispensing equipment, postmixed soft drink dispensing equipment systems, fixtures, signs, supplies, money, credit, services, or other things of more than nominal value to the retailer; or

(3) extending credit to the retailer for a period in excess of the credit period that is usual and customary in the soft drink distribution industry for the particular class of transactions.

(c) As used in this Act, the term "postmixed soft drink dispensing equipment" means all of the components used to produce carbonated water and to mix soft drink syrup with carbonated water as the soft drink is dispensed from a faucet.

(d) Subsections (a), (b), and (c) shall take effect on the date which is sixty days after the date of enactment of this Act.

○

Senator METZENBAUM. Our first witnesses, panel one, are Stanley Bregman, counsel for the Committee Against Equipment Giveaways, of Bregman, Abell & Kay, Washington. We will hear from Brook Jason, president of Jason Soda Systems, Inc., South Windsor, CT; William V. Eaton, vice president of Cini-Little International Food Service Consultants, Potomac, MD; Mark Imbesi, general manager of the Imbesi Bottling Group, Mid-Atlantic States, Bridgeton, NJ; and H. Ronald Harris, president of Better Beverages/Bar Master, of Cerritos, CA.

Each of the witnesses will be limited to 5 minutes, and I will ask the timer to keep track of it. Mr. Bregman, will you please proceed?

STATEMENT OF A PANEL CONSISTING OF STANLEY I. BREGMAN, COUNSEL, COMMITTEE AGAINST EQUIPMENT GIVEAWAYS, WASHINGTON, DC; BROOK R. JASON, PRESIDENT, JASON SODA SYSTEMS, INC., SOUTH WINDSOR, CT; WILLIAM V. EATON, SENIOR VICE PRESIDENT, CINI-LITTLE INTERNATIONAL, INC., POTOMAC, MD; MARK A. IMBESI, GENERAL MANAGER, FOOD SERVICE DIVISION, IMBESI BOTTLING GROUP, BRIDGETON, NJ; AND H. RONALD HARRIS, PRESIDENT, BETTER BEVERAGES, INC., CERRITOS, CA

Mr. BREGMAN. Thank you, Mr. Chairman. My name is Stanley Bregman and I am counsel for the Committee Against Equipment Giveaways. This committee was formed about 3 years ago to fight, really, the nefarious practice of the two giants in the soda industry, Pepsi and Coca-Cola, for they were engaged in giving away equipment, free equipment.

Now, this wasn't used only to eliminate their competition, but also it creates a severe detriment to hundreds of small businesses throughout the United States which are engaged in the business of selling and leasing dispensing equipment.

Now, the opposition to S. 114, which we support very vigorously, will say that this industry shouldn't be singled out. Sir, there is ample precedent. One, Congress saw fit, in its wisdom, not to allow equipment giveaways in the alcoholic beverage industry.

Also, the State of Wisconsin has a bill, and it is working very well, that would not allow it in the soft drink industry. And also, sir, there are very few industries where there are just two companies that have such economic dominance within that industry, and that operate mainly at a heedless self-interest.

Some years ago—in fact, many years ago, going all the way back to 1937, I received my first lesson in government, Mr. Chairman, from my immigrant parents that took me maybe just a few hundred yards from where we are sitting today to the East Plaza of the Capitol to witness the second inauguration of Franklin Delano Roosevelt.

We stood way in the back of the plaza on that cold day and my father lifted me on his shoulders so I had a glimpse of Mr. Roosevelt. So I remember that, and I kept the speech all these years, and in that speech President Roosevelt said we have always known that heedless self-interest is bad morals. Now, we know it is bad eco-

nomics and, sir, that is what this bill will do; it will stop some bad economics.

I would like to relinquish the rest of my time to the other members of the panel who will speak in more specifics about how this giveaway program of the two companies is really injuring them.

Senator METZENBAUM. Very good. Thank you, Mr. Bregman; nice to see you again.

Mr. BREGMAN. Thank you, sir.

Senator METZENBAUM. Mr. Jason.

STATEMENT OF BROOK R. JASON, PRESIDENT, JASON SODA SYSTEMS, INC., SOUTH WINDSOR, CT

Mr. JASON. Good morning, Mr. Chairman. My name is Bud Jason and I am president of Jason Soda Systems, of South Windsor, CT, a suburb of Hartford. I am a charter member of the National Beverage Dispensing Equipment Association, which was formed in 1969, and I am also a member of the National Soft Drink Association. My friend, Al Griggs, is here today, who is chairman of the National Soft Drink Association, representing the opposition. I must tell you that he does not represent my views, as well as a number of other independents in the soft drink industry.

I would like to take a couple of minutes to give you an overview of how our business was evolved, which gives an indication to how a lot of other businesses like ours were established over the years.

In 1945 my father, Isy Jason, whose parents owned a soda fountain, had a problem finding someone to fix that fountain. He wrote away and bought the parts and determined here was a business that could be established in the Connecticut area, and went on to expand that business.

Some of you will recall that soda fountains were common in drug stores, and our industries go back to that point in time with the installation and service of soda-dispensing equipment.

In the early days of our business, carbonated water was dispensed from a draft arm, and mixed syrup from a soda pump in the soda fountain rail. Many of you may recall having a cherry Coke a number of years ago where the two items were stirred together in the glass.

The development and use of this equipment gave birth to our industry.

As technology progressed, equipment was developed to dispense a mixture of carbonated water and fountain syrups automatically; hence, the name fountain-dispensing business used by several of the national syrup manufacturers. The mixing of carbonated water and syrup at the point of dispensing is called postmix. It is interesting to note the distinction because this differs dramatically from premix, which is nothing more than bottled or canned soda in 5-gallon tanks.

Soft drink bottlers have traditionally derived their greatest revenue from the profits from cans, bottles, and premix. To many bottlers, postmix was merely sampling to drive can and bottle sales.

We developed our business from providing carbonation systems and fountain syrups to restaurants, taverns, soda fountains, and a

variety of other food service outlets. Our revenues in the early years came from renting this type of equipment, along with a supply of carbonic gas used to make carbonated water.

In our case, we also supplied fountain syrups that were used in conjunction with the carbonation system. I am proud to say that we have been a Coca-Cola fountain syrup wholesaler for over 40 years.

Coca-Cola, unlike Pepsi Cola, has used independent wholesalers as well as bottlers to distribute their product. We also sell brands Seven-Up, Sunkist, Canada Dry syrups, and a line of products that we make under our own label.

We established this business by renting equipment to restaurants who needed service to this type of equipment around the clock. Service was the key issue. We serviced our customers 7 days a week, 365 days a year.

Having started the business from scratch with essentially no capital, the revenue was generated out of a reasonable rate of return on the rental of the equipment. We built capital and reinvested it and, in turn, expanded the business.

For over 40 years, we have purchased and rented equipment to smaller outlets throughout our marketplace. Our markup was based on an 18-month rate of return on our equipment and installation costs, which, frankly, is not uncommon in a number of rental businesses even outside the food service industry.

I am saddened to tell you that in recent years it has become difficult to rent equipment and sell fountain syrup at a reasonable markup because of policies and forces in the marketplace directly attributable to the two dominant cola manufacturers in the industry.

We have purchased no new equipment, identified equipment, in over 3 years as a function of what is going on today. What we see is equipment being loaned or leased at low cost to smaller outlets and syrup being sold to these same outlets at wholesale cost.

In the early years of our business, Coca-Cola USA, a division of the Coca-Cola Co., and Pepsi Cola, while interested in the national restaurant chains, were not active in the individual owner-operator accounts.

In the late 1940's when we began in the syrup distribution business, Coke and Pepsi had their flagship brands only and no other allied products were manufactured. In recent years, however, Coke and Pepsi have developed and marketed a full line of products to meet the customer's taste for the lemon and lime segment and other fruit flavors. With these added products, they now wanted total control of the account.

As Coke and Pepsi's business grew in the national account market over the years, the business of our industry members grew in the smaller-volume outlet. Our business grew dramatically over the years until about 5 years ago. We projected planned growth from the placement of new——

Senator METZENBAUM. Wind up, please, Mr. Jason.

Mr. JASON. Excuse me?

Senator METZENBAUM. Will you wind up, please? The red light is on.

Mr. JASON. Now, market pressures from the cola manufacturers are such that we cannot compete. I was asked 3 years ago by a senior vice president from one of the cola manufacturers that I should consider selling my business because it was evident to him that people like us would not survive long-term.

I come from a family business. I am second generation; I have third generation who sits in this room with me today. I care not to be intimidated by that kind of philosophy. If this practice is not stopped, we won't be here a year from now talking about this.

[The statement of Mr. Jason follows:]

STATEMENT

OF

BROOK R. JASON

RELATING TO S.114

Mr. Chairman -- Good Morning!

My name is Bud Jason and I am the president of Jason Soda Systems, Inc. In 1945 my father Isy Jason whose parents owned a soda fountain in Bristol, Ct. had a problem finding a company to repair their soda fountain, created a company to install and service soda fountain equipment. Some of you may recall that soda fountains were common in drug stores in the 30's and 40's. Our industry's roots go back to the sale, installation and repair of soda dispensing equipment. When our family business was formed, the company name was Jason Carbonator Service because carbonators were the devices used to make the carbonated water from water and CO2 or carbonic gas. Today we are Jason Soda Systems, Inc.

In the early days of our business, carbonated water was dispensed from a draft arm and mixed with syrup from a syrup pump in the soda fountain rail. Many people can recall having a vanilla or cherry coke made by having the syrup and carbonated water stirred together. The development and use of this equipment gave birth to our industry.

As technology progressed, equipment was developed to dispense a mixture of carbonated water and fountain syrups in an automatic way; hence the name fountain dispensing business used by several of the national syrup manufacturers. The mixing of carbonated water and syrup at the point of dispensing is called post-mix. This differs significantly from pre-mix which is nothing more than bottled or canned soda sold in bulk, normally 5-gallon containers.

Jason developed its business from providing carbonation systems and fountain syrups to restaurants, taverns, soda fountains and a variety of other food service concerns. Its revenue in the early years came from the renting of this type of equipment along with the supply of carbonic gas used to make the carbonated water. In our case, we also supplied the fountain syrups used in conjunction with the carbonation system. We are proud to say that we have been a Coca-Cola fountain syrup wholesaler since the late 40's. We also sell 7-Up, Sunkit Orange, Canada Dry products and a line of our own fountain syrups which we manufacture under our label.

Isy Jason established his business by renting equipment to restaurants who needed service for this type of equipment around the clock. In our market-place our reputation has been based on our ability to provide service 7 days a week, 365 days a year. In today's difficult labor market in the New England area, this is no easy task. We are faced on a continual basis with rising costs of insurance (both liablity and health insurance) as well as ever increasing labor rates, vehicle costs, gasoline and many other ovehead expenses.

Having started the business from scratch with essentially no capital, the revenue was generated out of a reasonable return on the rental of equipment which a growth in capital in turn could be used to expand our accounts. For over 40 years, we have purchased and rented equipment to similar types of outlets throughout the New England marketplace.

I am saddened to tell you that in recent years it has been most difficult to rent equipment and sell fountain syrup at a reasonable mark-up because of policies and forces in the marketplace directly attributable to the two dominant cola manufacturers in the industry.

In the early years of our business, Coca-Cola USA, a division of The Coca-Cola Co., and Pepsi-Cola, while interested in the national restaurant chains around the country, were not active in the individual owner/operator restaurants that we have historically serviced. The programs offered by Coke & Pepsi have always been available to large national accounts. Such programs often include the placement of equipment on loan, marketing assistance as well as the payment of marketing funds for the sale of their products. In the late 40's when we began in the syrup distribution business, Coke & Pepsi had their flagship brands and no other allied products were manufactured. In recent years, Coke & Pepsi have developed and marketed a full line of products to meet the consumer's taste for the lemon & lime and other fruit flavors as well as diet beverages. With these added products they now wanted total control of the account.

As Coke & Pepsi's businesses grew in the national account market over the years, the business of our industry grew in the smaller account market. We took our cost of equipment, established a reasonable rate of return on the equipment, determined the cost to service that equipment, and established a rental rate structure that also allowed us to be competitive in the marketplace with our peers in similar businesses.

Our business grew dramatically over the years and until about 5 years ago, we projected planned growth from the placement of new accounts, additional rental income, carbonic gas sales and syrup sales.

Over the past few years however, we have been subjected to market pressures we feel we cannot overcome. We in our organization as well as hundreds of companies like us now find we are whipsawed by the dominant cola manufacturers in a manner that is unfair and anticompetitive. Allow me to explain.

Traditionally, we have gone to equipment manufacturers and purchased counter-top refrigerated dispensing equipment and other post-mix equipment at the most competitive prices we could secure and approached our customer base to lease, rent or purchase this equipment from us. Our rates historically have been established by repaying our investment in hardware and installation costs amortized over an 18 month period, and providing the customer with equipment service for the duration of the signed agreement. Now we find ourselves in the same marketplace, and have for several years, with the dominant cola manufacturers who provide the same equipment, often purchased at lower prices due to their large buying power. They do not rent, lease or sell equipment.

Rather they loan it or virtually give it to the same smaller volume customers we traditionally rented it to. Moreover, in their effort to compete for a larger market share relative to one another, we have found that they have lowered their syrup prices resulting in the smallest or lowest volume accounts being able to purchase syrup products at or below our wholesale cost.

To add insult to injury, these same two cola giants come to us and ask us to be their agent to install the equipment they have given to our former customers, service it, and provide the syrup for a small delivery fee. If we don't do it - "we'll get someone who will!" In many cases, they have approached our existing customers who were under contract with us, and induced them to break their contracts by offering equipment at little or no cost. Recently, we experienced a situation where a local Pepsi Cola bottling company was purchased by a large conglomerate which attempted to stake its claim in the marketplace by approaching almost every fountain type outlet in its franchised territory. They offered equipment at little or not cost ($1.00 per week) with national pricing on its syrup. One might ask how this can be done and for how long. Well, we have discovered over the years, and it has been readily admitted, that such activity is funded by the parent companies of both of the major cola manufacturers under the guise of marketing or advertising allowances. Pepsi Cola for example readily acknowledges subsidizing their bottlers to gain market share.

How do we compete with this?! Quite frankly, one of the few resources has been to pursue legal avenues directly against our customers by trying to enforce our agreements. Obviously this does not build goodwill in the

marketplace but our customers already believe at this point that we have been overpricing our product for years and frankly they could not care about their contact with us. One of the most blatent scenarios we see in the marketplace is a different "deal" being offered to each and every customer up and down the block in an effort to take the business away from the competition. While I truly believe that it is not the intent of either Coke or Pepsi to put companies like ours out of business, we are caught in the proverbial "squeeze play". We do not have the buying power nor do we have the "staying power" long term to meet this type of unfair competition.

Two years ago, we had two mechanics doing nothing but picking up our equipment around the countryside that had been disconnected and removed by Pepsi-Cola bottler I mentioned previously. Its interesting to note that our rental prices today, in an attempt to compete with Coke & Pepsi, are significantly lower than they were three years ago. As both Coke & Pepsi have expanded their free or loan programs to any and all accounts, we see no future expansion of our business in fact just survival may be very difficult. Unlike some of my contemporaries in the industry, we have been financially sound enough up to this point to sell our product based on the quality of our service even at a higher price and to overcome <u>some</u> of the objections of free or low priced equipment. Realistically however, we don't think we can continue much longer; it is difficult to compete when your competitor gives away the product you are trying to sell.

We have often said that we can compete with any of our peers in the marketplace who are buying equipment from the same sources and who have to work within the same labor market and endure the same overhead costs that we have in our marketplace. These practices must stop if we are to survive. Survival for

some of us, frankly has not been possible and some of my peers sitting in this room have all but been starved out of their businesses. Somer were lucky to cash out part of their investment by selling to a local Coke or Pepsi bottler.

Several years ago, I was approached by a senior vice president of one of the major syrup manufacturers with regard to selling my business. I told him it was a business I enjoyed, I was second generation and as with many family businesses hope my children will have the opportunity, if they have the desire, to follow me in this business. This executive suggested that my ideals were not realistic; that in fact, we in our businesses in the long run will probably not exist because the cola manufacturers are acquiring more and more independent bottling companies and will eventually acquire businesses like ours as well. He said, I should be content to get a fair price and sell out to a bottling company and pursue other interests. Quite obviously I was not intimidated by the picture he painted and told him I hoped I could continue to make my mark in this industry for some time to come.

As the cola wars escalate, I must say I sometimes question whether my ideals are realistic. We cannot compete with free equipment; we cannot compete with small margins on syrup and still cover our overhead. But the question I ask here today is why should we have to compete with these grossly unfair trade practices when everything they stand for is unjust! I often wonder, if the sales personnel of either of the major cola giants had to go out and truly sell relying on their own sales skills and the quality of their product, how many accounts would they have today. Both of these companies have grown in the fountain syrup business with the help of and at the expense of companies like ours who have represented them well over the years. Now that we have helped to develop their business in a significant way, must we fall by the wayside? There is certainly something wrong with American business philosophy if two dominating giants can destroy an industry in their desire to become number one.

Senator METZENBAUM. Thank you very much, Mr. Jason.
Mr. William V. Eaton.

STATEMENT OF WILLIAM V. EATON, SENIOR VICE PRESIDENT, CINI-LITTLE INTERNATIONAL, INC., POTOMAC, MD

Mr. EATON. Thank you, Mr. Chairman. Thank you for having us here this morning. I am William Eaton, senior vice president of Cini-Little International, a worldwide consulting firm. I am also the past president and a fellow of both the Food Service Consultants Society International and the Society for the Advancement of Food Service Research.

I bring to the panel this morning a different perspective on the problem we see with the giveaway equipment. We are equipment consultants to the food service industry. We work with our clients, such organizations as hotels, restaurants, the institutions around the country, the Architect of the Capitol of these buildings where we meet today, to plan food service facilities.

Part of that planning effort is to judge the needs of the food service facility and to select and specify the equipment which best meets those needs. We prepare documents that identify that equipment. We communicate the mechanical, electrical, architectural, space, and special conditions needs of that equipment to the design members of our design team, and they in turn put that information on documents which allows the building to be built and the utilities to be provided.

Part of our specification includes a provision for substitution of equipment. We do that in deference to the kitchen equipment manufacturers and kitchen equipment suppliers who can come to our clients and suggest that there is another piece of equipment which will meet that specification.

We will review that specification and, based on the supplier making any modifications necessary to the installation to allow it to be incorporated without cost to the client and based on it fulfilling all of the needs of the original specification, that equipment is allowed.

In the case of syrup manufacturers providing free equipment, it is not done prior to the specification of equipment. It is not done with the design team, but it is done directly with the client on the basis that it is free.

We all know there is no free lunch; nothing is free. Everything must be paid for. The payment comes in the form of higher syrup prices. And, unfortunately, as this substitution by the syrup manufacturer takes place, the client is led to believe that we, the consultants, have misled him, and therefore, we have charged him a fee and not provided a service which we promised to provide, which, of course, is absolutely contrary to fact.

We have a great concern that our clients do not understand the implication of the provision of free equipment by the syrup manufacturer and, in fact, do not understand it until after the fact and after the equipment has been replaced with equipment which does not have the same capacity, does not have the same ability to provide quality product, and, in fact, has caused extensive expense in

the change of utilities, the change of the space, the modification of equipment in order to allow it to be——

Senator METZENBAUM. Do you have any evidence that higher syrup prices are charged where the equipment is installed free?

Mr. EATON. I do not. Evidence is something that I would expect would be formally presented, and I do not have formal documentation myself.

An example of the problems that we have seen in the industry right here in Washington at the Air and Space Museum where we had designed specific equipment to provide the dispensing of syrup—after the facility was under construction and the utilities had been placed, Coca-Cola approached the operator of the facility and said they would provide all of the equipment free in order to have the account.

As a result, the operator and the Smithsonian agreed to have the equipment that was specified removed from the specification and the free equipment was installed. When it was installed, they found that they had neither the utilities nor the space to accommodate it. Additional modifications and considerable expense went to allow that to happen.

We are facing that in several other installations in the area and nationwide. We have just completed the design of a facility in Minnesota which has currently cost the client over $10,000 in engineering fees. He looks to us as a problem in not specifying the free equipment which would have allowed him not to purchase equipment.

[The prepared statement of Mr. Eaton follows:]

TESTIMONY OF
WILLIAM V. EATON
SENIOR VICE PRESIDENT
CINI-LITTLE INTERNATIONAL, INC.

I am the Senior Vice President of Cini-Little International, Inc., a design and business consulting company with nine offices located in the United States and Canada and performing services to the foodservice, lodging, health care, and related industries throughout the world. In our professional capacity as design consultants, we not only plan foodservice facilities but also specify the equipment which fit the plans and hence the goals of our clients. It is important to recognize that while our clients may be architects, developers, or operators, the real recipients of our expertise are the people who dine in the various facilities which we have planned.

Methodology

Our method of operating includes developing a program for the facility which we are to design which includes accumulating all of the data with regard to who will be utilizing the spaces and what the marketplace demand is for services. We either obtain proposed menus from our clients or we develop menus for the facilities to be planned. Once this data is collected and analyzed, a space plan is developed to meet the market requirements and to ensure a smooth and harmonious understanding of the facility by ultimate clients.

Once the preceding process has been completed and approved by our client, we begin the process of selecting the various items of equipment required to accomplish the menu and meet the requirements of the ultimate consumer at the facility. Our selection process for each item of equipment is predicated upon a number of specific determinations including but not limited to the ability of the chosen piece of equipment to meet the requirements determined in the programming and planning phase; the reputation of the manufacturer for reliability and service-free operation of the equipment he manufactures; the presence of reputable, effective, and rapid service capabilities in the area in which the facility is located; and a credible and knowledgeable representative for the product to train operator's staff relative to the equipment.

Once the equipment has been selected and approved by our client, usually item by item, we prepare the electrical, mechanical, and plumbing plans showing the exact location of the items and utilities plus interconnecting line runs between various pieces of equipment. We provide these documents to the architects and engineers on the project so that their planning process can continue.

Substitutions

We normally, unless directed otherwise by our clients, specify precise items of equipment that we and the client have decided best meet the needs of the project, and because of the special requirements of various items of equipment relative to size, utility requirements, and interconnecting runs, we do not allow substitutes under our specifications. The reason for this is simple. When substitutions are made, it often necessitates changes to the electrical and plumbing requirements which often lead to changes in electrical wiring sizes, circuit breaker sizes, and other changes for the electrical portion as well as piping changes and possibly size changes in the facility being built. Recognizing that often substitutions are suggested by foodservice equipment dealers, we include in our specifications requirements that the contractor who suggests substitutions must, at his expense and as part of the substitution, assume all responsibilities and liabilities relative to the overall change. This may include moving walls, changing mechanical, electrical, and plumbing rough-ins or points of penetration; plus changing the interconnecting piping and wiring, circuit breakers, and whatever else it takes to make the finished facility work properly without increasing the cost to the owner.

Undue Interference

We have been concerned for some time by a practice initiated by Coca Cola and Pepsi to provide their equipment directly to owners at little or no cost for the basic equipment. The reality is that the offer when made does carry the requirement that only Coke or Pepsi products can be used with the equipment being supplied. This has been true for years in a number of areas such as ice cream manufacturers supplying ice cream cabinets, coffee suppliers supplying coffee urns and the like. For the most part, these two producers of

products use standard items of equipment that can easily be replaced by another standard item of equipment if necessary; however, it does often cause size and other problems previously identified.

The problem in the soft drink industry has been that one major syrup manufacturer has for a number of years been offering their equipment to owners at a substantial reduction in cost or at no cost whatsoever except for the increase in the cost of syrup to the owner plus a requirement that no other manufacturer's syrup can be used in the system. This has a number of adverse effects which unsophisticated owners often miss.

1. The ultimate consumer of the product; i.e., soft drinks, often has diverse likes and dislikes and may well elect to dine elsewhere if the product of his choice is not available. While to many, the differentiation between Pepsi Cola, Coca Cola, Royal Crown Cola, or 7-UP and the like may not be substantial, to many people in the marketplace it is terribly important and hence when one product is not available they do seek other solutions. These solutions often include finding another place to dine.

2. The syrup manufacturers often provide free service to the owner on equipment that the owner may use as long as the owner purchases syrup from them. Coca Cola, the supplier in question in this case, frequently refused to service equipment not provided by them. As a result, they have been instrumental in having dispensing equipment removed and replaced with their own firm's products or products preferred and approved by their firm. The reason seldom seems to have anything to do with the quality of either the equipment originally supplied or the finished product being served to the customer but rather seems more aimed toward supplying products that they control so that the syrup will continue to be purchased from said producer. The result is that the owner then is erroneously led to believe that the product removed was an unsatisfactory one and that not only the manufacturer who provides said equipment but the consultant who specified it did him a disservice.

3. When free equipment or reduced price equipment is offered by the manufacturer, it is often without any real understanding of the problem which will be caused by the installation of the free equipment in lieu of equipment which was originally specified. This has happened time and time again where the client has accepted the offerings of the free equipment only to find that the equipment is not technologically capable of providing quality soft drinks at great distances and hence cannot use the piping and other mechanical connections already provided by the base contract. In such instances, other equipment has to be supplied in various locations far from the originally planned location for installation, additional new space has to be created to accommodate the additional equipment, and new utilities have to be run to the new location. All of this to assure that Coke or Pepsi have a lock on the syrup to be used in the location and prevent the client from using the specified equipment which the consultant has selected.

Examples

1. The Smithsonian Air and Space Museum foodservices were planned and specified by Cini-Little International, Inc. The equipment selected for the project was manufactured by Perfection Equipment, Inc. During the process, Coca Cola, USA approached the owner and operator and suggested making a change which they accepted without recognizing that the installation would not be completed as originally planned and that other space would have to be made available for equipment to service the outlying areas. Turmoil and additional cost involved in this process were substantial.

2. St. Paul Companies employee cafeteria in their new headquarters building in St. Paul, Minnesota, was planned and specified by Cini-Little with a remote soda system manufactured by Perfection Equipment., Inc. During the construction process, the syrup producer proposed to the operator and then to the owner that their "free" equipment be substituted. The resulting change required changes to the architectural and engineering documents, the equipment detail documents, shop drawings, and our documents, all at considerable expense. While the installation

and operation are still 12 to 18 months off, there can be little doubt that the substituted equipment will dispense a beverage of both lower quality and less consistency due to the limited chilling and carbonation capacity.

3. Ice Dispensing Equipment

A parallel and equally frustrating situation concerns the refusal of the two major syrup manufacturers to interface with automatic ice maker/soda dispensing equipment manufacturers. The result is that not only are the soda system manufacturers forced off projects, but the ice maker manufacturers are also. In fact, the two major syrup companies have gone so far as to "certify" manufacturers with whom they will allow their equipment to interface. The resulting changes in equipment during the later stages of a project cause no end of problems relative to project cost, detail, and utility changes, etc. The net result is our clients end up with a dispensing system which does not provide them with the level of quality intended or promised by the consultant.

Summation

We as consultants are hired by foodservice operators and owners directly or indirectly to provide our substantial expertise in the selection of foodservice equipment and the planning of the facilities to maximize the return on investment for the client. Any interference in the process by outside influences such as the two major manufacturers negates or limits our role in the process and gives rise to questions about our credibility in those areas. The fact is that we have specified top-quality equipment which the two major manufacturers refuse to service and are instrumental in having removed time and time again by unsuspecting owners. This is a disservice to the owner and to the public at large and certainly to us as independent and objective consultants with no vested interest in any product. We apply our considerable skills and background to the proper selection of equipment to meet the needs of the project and find it abhorrent that any outside influence with a vested interest should be brought to bear in our selection process solely to monopolize the syrup market.

As bad as that may be, we could more readily accept the suggested syrup manufacturer's products if the process were one of effective selection. But since it often occurs after the project has been finally planned, sent out to bid, the successful contractor selected, and the work begun, it frequently necessitates changes in the field resulting in extra costs to the owner. This is a very poor practice and one which should be stopped without question. The time for selling the product is prior to the issuance of documents for bidding purposes and this eleventh hour sneak attack way of doing business should be stopped since it does not serve our clients or the ultimate consumers in any fashion but rather serves the vested interests of the syrup manufacturer only.

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Senator METZENBAUM. Thank you very much, Mr. Eaton.

Our next witness is Mr. Imbesi. We are happy to have you with us.

STATEMENT OF MARK A. IMBESI, GENERAL MANAGER, FOOD SERVICE DIVISION, IMBESI BOTTLING GROUP, BRIDGETON, NJ

Mr. IMBESI. Good morning, Mr. Chairman. I am Mark Imbesi, the general manager of the Food Service Division and one of the principal owners of the Imbesi Bottling Group, a Seven-Up, RC bottling company from the Middle Atlantic States. We have food service operations in Pennsylvania, New Jersey, Delaware, Maryland, and parts of Virginia. Today, I am testifying in support of S. 114.

I would like to speak to you about the current situation regarding equipment giveaways, or, better put, the providing, free of charge, of dispensing equipment for the purpose of excluding competition. This practice is engaged in by our competitors.

This practice, which started several years ago, is continuing to escalate despite claims by our competitors that they plan to discontinue their free equipment programs and charge for service.

The effects and injury to my business by this practice can be measured in lost business revenues, decreased franchise value, business opportunities lost, and immeasurable lost sampling opportunities for our franchise products.

Some examples: with regard to lost business revenue, one of the major customers lost due to this program was ARA, the largest vending and food service company in the country. I was told by their vice president of purchasing that he likes Seven-Up and would like to continue purchasing Seven-Up. However, if ARA did stay with Seven-Up, they would jeopardize their free equipment programs that have been introduced by our competitors. That was in 1985. In the previous year of business, my company did over 250,000 dollars' worth of fountain business with ARA.

Another customer which was lost specifically——

Senator METZENBAUM. If you buy Seven-Up, they won't give you the free equipment?

Mr. IMBESI. That is right. If he continued to use Seven-Up fountain products, they would lose their free equipment program.

Senator METZENBAUM. What does the free equipment program require of the vendor?

Mr. IMBESI. That they purchase a core set of products from Coca-Cola, and that core set of products at that time, and I believe it is still is the same today, is Coca-Cola, Diet Coca-Cola, and Sprite.

Senator METZENBAUM. And is Sprite a competitive product to Seven-Up?

Mr. IMBESI. It is an imitation of Seven-Up. [Laughter.]

Senator METZENBAUM. I am not sure everybody in the audience agrees.

Mr. IMBESI. Pardon me?

Senator METZENBAUM. I am not sure everybody in the audience agrees.

Mr. IMBESI. With all due respect, sir, it absolutely is, and the majority of the people who are familiar with the beverage industry recognize that, including the people in Atlanta.

Senator METZENBAUM. I will allow you an extra minute. [Laughter.]

Mr. IMBESI. Thank you. Another customer which was lost specifically as a result of the giveaway program was the former Gino's fast food chain. Based in Philadelphia, the Gino's chain ran over 200 fast food and family-style restaurants which purchased Seven-Up syrup from my operation.

Shortly before this chain was sold to the Marriott Corp., Coca-Cola provided, free, all new equipment to all locations. The end result was that our competitors became the exclusive soft drink purveyor in all locations.

Hyatt Hotels in Baltimore, MD, and Cherry Hill, NJ, were our accounts that were lost due to our competitors providing, free, all new equipment. We were providing equipment, but we still lost the accounts because Hyatt did not wish to jeopardize their national equipment program proposed by our competitors.

Pargo's Restaurant and Saloon is a growing chain of restaurant saloons whose base of operation is outside of our franchise territory. However, my company was serving two locations in the Baltimore area. Again, we were providing equipment, but lost the account because Pargo's headquarters decided to go with a national free equipment program.

H.A. Winston, a chain of saloons in the Philadelphia area which is since out of business, was served by us for over 10 years. Our competitors came in with a free equipment program and became the exclusive soft drink supplier.

Other major accounts that were lost business due to these programs were Harrah's Hotel and Casino in Atlantic City; several independently-owned Holiday Inns and the Holiday Inn parent company; the Delaware Valley buying cooperative, a buying cooperative for diners and restaurants in the Delaware Valley; Wendy's franchise restaurants; and corporately-owned Po Folks Restaurants, just to name a few.

The list could go on and on. I have named major and recognizable accounts. However, our competitors, with their free equipment programs, have had an even greater impact on the independent-account side of our business, those smaller accounts.

One of the most often heard comments from independent retailers is, I would love to have Seven-Up, but this is not my equipment, or they won't let me use anything else but their products, or if I use your products, I will be charged rent. These are lost opportunities.

In summation, these programs have cost my companies over $2 million in lost annual revenue, and decreased the value of my franchise by limiting the number of available units to sell, and have diminished the sampling ability of my franchise brands.

I urge you to enact S. 114. Thank you very much.

[The prepared statement of Mr. Imbesi follows:]

STATEMENT

OF

MARK A. IMBESI

RELATING TO S.114

Mr. Chairman,

I am Mark Imbesi, the General Manager of the Food Service Division and one of the principal owners of the Imbesi Bottling Group, a 7UP/RC Bottling Company from the middle Atlantic States. We have Food Service operations in the Delaware Valley and the Maryland area. I am testifying in support of S.114.

Today, I would like to speak to you about the current situation regarding equipment give-aways, or better put, the providing, free of charge, of dispensing equipment for the purpose of excluding competition, engaged in by our competitors.

This practice, which started several years ago, is continuing to escalate despite claims by our competitors that they plan to discontinue their equipment programs and charge for service. The effects and injury to my business by this practice can be measured in lost business revenues, decreased franchise value, business opportunities lost and immeasurable lost sampling opportunities of our products.

Some examples, with regard to lost business revenue: One of the major customers lost due to this program was ARA, the largest vending and food service company in the country. I was told by their Vice President of Purchasing that he likes 7UP and would like to continue using 7UP; however, if ARA did stay with 7UP, they would jeopardize the free equipment programs that had been introduced by our competitors. This was in 1985. In the previous year of business my Company did over $250,000 worth of business with ARA.

Another customer which was lost, specifically as a result of the give-away program, was the former Gino's Fast Food Chain. Based in Philadelphia, the Gino's chain ran over 200 fast food and family style restaurants which purchased 7UP syrups from my operation. Shortly before the chain was sold to the Mariott Corporation, Coca Cola provided free all new equipment to all locations. The end result was that our competitors became the exclusive soft drink purveyor in all locations.

Hyatt Hotels in Baltimore, Maryland, and Cherry Hill, New Jersey, were our accounts that were lost due to our competitors providing free all new equipment. In these accounts we were providing equipment but we still lost the account because Hyatt did not want to jeopardize a national equipment program proposed by our competitors.

Pargo's Restaurant and Saloon is a growing chain of restaurant saloons whose base of operation is outside of my franchised territory; however, my Company was serving two locations in the Baltimore area. Again, we were providing equipment but lost the account because Pargo's headquarters decided to go with a national free equipment program.

H.A. Winston, a chain of saloons in the Philadelphia area, was served by us for over ten years. Our competitors came in with a free equipment program and became the exclusive soft drink supplier.

Other major accounts where we lost business due to these programs are: Resorts International Hotel and Casino, several independently owned Holiday Inns, Delaware Valley Buying Cooperative (a buying cooperative for diners and restaurants in the Delaware

Valley), Kentucky Fried Chicken franchised restaurants, and corporately owned Po Folks restaurants, just to name a few. The list could go on and on.

I have named major and recognizable accounts, however, our competitors with their free equipment programs, have had an even greater impact on the independent account side of the business.

One of the most often heard comments from independent retailers is, "I'd love to have 7UP but this is not my equipment", or "They won't let me use anything else but their products", or "If I use your products, I'll charged rent." These are lost opportunities!

In summation, these programs have cost my Companies over two-million dollars in lost annual revenue and decreased the value of my franchises by limiting my number of units sold. They have effectively locked my products out of certain markets and have diminished the sampling ability of my franchised brands. I urge you to enact S.114.

Thank you.

Senator METZENBAUM. Mr. Harris, we are happy to hear from you, sir.

STATEMENT OF H. RONALD HARRIS, PRESIDENT, BETTER BEVERAGES, INC., CERRITOS, CA

Mr. HARRIS. Thank you, Mr. Chairman. My name is Ron Harris. I own and operate Better Beverages, Inc., of Cerritos, CA, which is just outside of Los Angeles. My company sells, leases, installs, and services beverage-dispensing equipment to the fountain market. My customers are restaurants, bars, taverns, fast-food outlets, schools, and hospitals. My father began selling fast-food establishments fountain equipment back in the early 1950's, and I have been in the business for over 25 years.

In the beginning, most loan or giveaway programs were for high-volume fast-food outlets, the schools and stadiums, and Coke and Pepsi disguised these equipment giveaways as marketing allowance or promotion opportunities. Clearly, however, their purpose was to control the fountain market and they have since expanded these programs to encompass practically every type of fountain outlet there is, all the way to small donut shops.

For example, when Coca-Cola furnishes dispensing equipment, they control the soft drinks dispensed from that equipment. Because Coca-Cola manufactures a family of soft drinks, they effectively exclude independent sellers of dispensing equipment and other manufacturers of soft drink syrups from selling to those retailers who have received this free or loaned equipment.

Recently, we have seen Coke and Pepsi try to increase their market share by buying Dr. Pepper and Seven-Up. Fortunately for the consumer, the Federal Trade Commission fought these acquisitions. In its complaint against Coca-Cola, the Commission charged its acquisition of Dr. Pepper, and I quote, "would substantially lessen competition in the market by increasing the likelihood of collusion and by making it more difficult for new firms to enter the market and more costly for current firms to compete."

The Commission alleged that the factors would likely lead to increased prices and restricted output of carbonated soft drinks. If it is anticompetitive for these companies to buy their competitors, how can they be allowed to run the beverage-dispensing equipment industry out of business by placing equipment in restaurants and taverns at little or no cost? Those of us appearing here today cannot compete against this practice. We cannot hold a candle to the vast capital resources of either of these giant companies.

I have a new letter which I would like to submit for evidence, if I may, from one of our accounts that Pepsi-Cola has offered free equipment to, a small chain of three restaurants. They have offered them a combination of equipment that is economically impossible for us or anybody else, I believe, to compete with.

Senator METZENBAUM. Do they require exclusivity in that letter?

Mr. HARRIS. I could only read you the contents of the letter, if you wish. It says Pepsi will loan at no charge three six-flavor serve dispensers for your existing three restaurants. Pepsi will also loan at no charge three bag-in-the-box systems, and so on. I don't think it spells out exclusivity, but it is there. They would not allow—

their contract will not allow any other products to go through, I am sure.

Today, because of programs like these, Coca-Cola and Pepsi-Cola control about 80 percent of the fountain soft drinks being sold. Caught in the middle of this, of course, in the cola wars are small businesses that collectively employ thousands of people whose livelihoods depend on their being able to sell and service beverage-dispensing equipment.

The immediate impact on the consumer is readily seen by the absence of soft drink brand alternatives in restaurants and bars. Ask yourself, have you ever had a choice between Coke and Pepsi or any other cola in a fast-food outlet?

How can any of us say that the consumer has a choice if the industry is reduced, for all intents and purposes, to just two companies, and those two only offer the consumer a choice of three or four products?

Beverage-dispensing equipment companies that would normally rent a piece of equipment for $600 or more a year are not finding customers in the wake of this free equipment. An average restaurant that requires equipment to dispense beverages would purchase equipment costing approximately $3,000, or rent it between $600 and $750 per year. These sales and rentals are being lost to free or loaned equipment that has flooded the market.

Recently at my company, we have had to release employment of two sales personnel because of lost sales, while Coca-Cola has moved in 32 representatives to broaden their position in the smaller retailers that we historically have serviced.

It is estimated that there are over 500,000 food service outlets in the United States. If we take that half of them have free or loaned equipment with a fair market value of $3,000 each, it would mean that there is over 750 million dollars' worth of free equipment in the marketplace at little or no charge. Worse yet, remaining are another 250,000 restaurants in the market which will inevitably be targeted for these free equipment programs.

Industry forecasts estimate that at the turn of the century more than 40 percent of all soft drinks sold in the United States will be dispensed through fountain equipment. This growth is fueling Coke and Pepsi's appetite to dominate the market. Unless we do something today to stop this unfair competition practice of giving away equipment, the direct result will be the end of business of the beverage-dispensing equipment industry which employs thousands of people, and the loss of choice in the marketplace for the consumer.

Senator METZENBAUM. Thank you very much, Mr. Harris.

Thank you, Mr. Chairman.

[The prepared and supplemental statements of Mr. Harris and response to questions follow:]

STATEMENT
OF

H. RONALD HARRIS

RELATING TO S.114

Mr. Chairman, my name is Ron Harris.

I own and operate Better Beverages, Inc. of Cerritos, California, just outside Los Angeles. My company sells, leases, installs, and services beverage dispensing equipment for the fountain market. My customers are restaurants, bars, taverns, and fast-food establishments. My father began selling and servicing fountain equipment in the late 1950's, and I have been continuously involved in the business for 23 years.

I am here today to testify in favor of S.114.

The beverage dispensing equipment industry existed long before bottles and cans were part of the soft drink industry. Fountain dispensing dates back to the mid-1800s and the invention of carbonated water. Since that time, there have been companies that have manufactured, sold, installed, and serviced beverage dispensing equipment. In the early 1900s, with the perfection of bottled soft drinks to take home for consumption, fountain dispensing began to die out. From the beginning of the bottling revolution at the turn of the century and on through the mid-1950s, the fountain business was a declining portion of the industry.

However, with the evolution of the fast-food industry in the 1950s, propelled by companies like McDonald's, Coke and Pepsi began to take another look at the fountair segment of the soft drink market. Until then, Coke and Pepsi only produced one product, their flagship brand.

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In the late 1950s and early '60s, Coca-Cola began to broaden their product line to include new soft drinks such as Tab, root beer, orange, and a small variety of other flavors, and in doing so, they also began to loan or give away fountain equipment to secure distribution of their syrup products. Beverage dispensing equipment companies assisted in the installation and service of this equipment not realizing, of course, the impact that these free equipment programs would have on their industry.

In the beginning, most loan or give-away programs were for high-volume fast-food outlets, schools, and stadiums, and Coke and Pepsi disguised these equipment giveaways as marketing allowances or promotion opportunities. Clearly, however, their purpose was to control the fountain market, and they have since expanded these programs to encompass practically every type of fountain outlet.

For example, when Coco-Cola furnishes the dispensing equipment, they control the soft drinks dispensed from that equipment. Because Coca-Cola manufactures a family of soft drinks, they effectively exclude independent sellers of dispensing equipment and other manufacturers of soft drink syrups from selling to those retailers who have received this free or loaned equipment.

Recently, we have seen both Coke and Pepsi try to increase their market share by buying Dr. Pepper and Seven-Up. Fortunately, for the consumer, the Federal Trade Commission fought these acquisitions. In its complaint against Coca-Cola, the Commission charged that its acquisition of Dr. Pepper "would substantially lessen competition in the market by increasing the likelihood of

collusion, and by making it more difficult for new firms to enter the market and more costly for current firms to compete...." The Commission alleged that these factors would likely lead to increased prices and restricted output of carbonated soft drinks.

If it is anti-competitive for these companies to buy their competitors, how can they be allowed to run the beverage dispensing equipment industry out of business by placing equipment in restaurants and taverns at little or not cost? Those of us appearing today cannot compete against this practice. We cannot hold a candle to the vast capital resources of either of these giant companies.

I have a letter here in which Pepsi-Cola offered one of my accounts, a large Mexican restaurant chain in Southern California that I have been serving for many years, $10,000 to convert to Pepsi.

I quote:

"You may use this check in any matter [sic] you choose." They did, in fact, take this account away from my company.

I have another letter from a very small restaurant in the San Fernando Valley to my company, that says:

"This letter is being written as a request to release me from my ... lease ... regarding the soda machines, due to the fact [that] I got free equipment from Coca Cola and feel it does not make good business sense to pay for something I can get free..."

Today, because of programs like these, Coca-Cola and Pepsico control 85 percent of the fountain soft drinks being sold.

Caught in the middle of the Cola Wars, of course, are small businesses that collectively employ thousands of people, whose livelihoods depend on their being able to sell and service beverage dispensing equipment.

The immediate impact on the consumer is readily seen by the absence of soft drink brand alternatives in restaurants and bars. Ask yourself, have you ever had a choice between Coke and Pepsi or any other cola in a fast-food restaurant?
The last time you ordered a "quarter pounder", did you have choice among branded soft drink beverages? Why didn't you?

How can any of us say that the consumer has a choice if the industry is reduced, for all intents and purposes, to just two companies and those two only offer the consumer a choice of four or five flavors?

This give away program not only impact companies such as mine. As you have heard today it also impacts companies that design restaurants and then sell them the equipment. They are now being told not to include beverage dispensing systems in their proposals because someone is going to furnish it free.

Hundreds of service companies that used to install and service equipment are seeing their business channeled away to the service departments of bottling plants owned or controlled by the major syrup manufacturers.

Further, some equipment manufacturers are seeing their sales decline and their marketplace diminish because their equipment isn't authorized by the syrup manufacturers that are giving away the equipment.

Beverage dispensing equipment companies that would normally rent a piece of equipment for $600 or more a year are not finding customers in the wake of this free equipment. An average restaurant or bar that requires equipment to dispense beverages would purchase equipment costing approximately $3,000 or rent it for about $750 a year. These sales and rentals are being lost to the free or loaned equipment that has flooded the market.

It is almost impossible to calculate the total financial impact that these giveaway programs have had on the beverage dispensing equipment industry during the past 10 years, but an educated guess would be revenue losses in the hundreds of millions of dollars.

It is estimated that there are 500,000 food service outlets in the U.S.. If half of them have free or loaned equipment with a fair market value of $3,000, it would mean that there is $750 million worth of beverage dispensing equipment in the market today at little or no charge.

Worse yet, the remaining 250,000 restaurants in the market, will inevitably be targeted for these free equipment programs.

In the last 15 years, we have seen the fountain industry grow by 30 percent. Industry forecasts estimate that by the turn of the century more than 40 percent of all soft drinks sold in the United

States will be dispensed through fountain equipment. This growth is fueling Coke and Pepsi's appetite to dominate the market.

I would like to take a moment to identify some of my colleagues and friends who have come her today to support Senate Bill 114. Among them, are small independent businessmen with second and third generation family-owned companies.

Chic Roviaro from Hammond, Indiana, operating in the south Chicago area. He is 70 years of age and has two daughters and twin sons, his wife, one grandson, and a brother, working in his company, along with his other 20 employees.

Unless we do something today to stop the unfair competitive practice of giving away equipment, the direct result will be the end of the beverage dispensing equipment industry, which employs thousands of people, and the loss of choice in the marketplace for the consumer.

Mr. Chairman, I urge the Congress to approve Senate Bill 114 and have it enacted into law to help preserve our small industry and to keep competition alive.

Thank you.

March 19, 1990

The Honorable Howard Metzenbaum
Russell Senate Building Room 140
Washington, D.C. 20510

Dear Senator Metzenbaum:

On February 20, 1990, I testified before you in support of S. 114. Time restraints did not permit me to respond to certain statements made by other witnesses who testified in opposition to this bill. Therefore, I would like to take this opportunity to supplement my testimony and have it made a part of the Hearing Record.

First it must be emphasized that the proponents of S. 114 are not opposed to bonafide advertising and promotional programs. Our concerns stem from the tied arrangement where a retailer accepts free equipment resulting in a contractual or implied obligation to buy only products manufactured by the supplier of the equipment.

One witness testifying against S. 114 stated that free equipment was part of a general marketing program earned by the retailer. In my opinion, the cost of the free equipment is subsidized by higher syrup prices to retailers and ultimately paid for by the consumer. By eliminating "free" equipment, Coke and Pepsi could lower the prices of their syrups. We are not suggesting or seeking an opportunity to market a different brand of Cola or other products. Rather we are seeking the elimination of inducements and tied arrangements, which, in turn, take away the consumer's freedom to choose among the many soft drinks that are still available.

The cost of producing a single gallon of fountain syrup is less than $2.00 per gallon including all ingredients, labor and packaging cost. Compare that to the wholesale cost to a distributor of Coca Cola syrup products which are approximately $5.50 per gallon, a markup of 175%. The wholesale distributor must mark up the product to cover the cost of delivery and make a profit. Although syrup costs vary to the retailer throughout the U.S., in my estimation, the price per gallon is approximately $6.00 or more. In my opinion which is shared by others engaged in manufacturing syrup, the wholesale price of syrup to a restaurant should be $4.00 or less per gallon. The current difference of $2.00 per gallon is being used to subsidize the free equipment programs and ultimately being paid for by the consumer.

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If you use my estimate that 50% of the fountain equipment in the market is owned or leased, then it follows logically that these retailers are paying a higher inflated price for syrup. The retailer who has free or loaned equipment pays the same inflated price but, he has been given the equipment. This may seem to be a marginal issue at some levels of usage but, when you look at the larger picture and the volume of fountain syrups being sold at these higher prices, the consumer is paying hundreds of millions of dollars more per year.

Clearly, no one can guarantee that the consumer would realize a reduction in the cost of a fountain soft drink if syrup prices were lower and there were no more free equipment programs available. No more than you see reduced prices for soft drinks by those who have free equipment now! But, I can guarantee you that there would be more competition both in the selling of beverage equipment and the sales of fountain syrups to retailers, ultimately benefiting the consumer by having an open market for all of these products. A market that is now controlled by two companies.

The statement made by Mr. Mark Gorman, ostensibly representing the opinion of the un-polled members of the National Restaurant Association, suggests that the free equipment programs are no different from incentives used in other industries, such as volume discounts and the familiar "bakers dozen". Is Mr. Gorman really suggesting we equate a dozen cookies costing $.10 and you receive a thirteenth cookie free, to a piece of beverage equipment which could range in cost from $1,500 to $3,000 in your average restaurant. There is no evidence that the consumer has benefited from the restaurant receipt of free equipment by reduced soft drink pricing. Furthermore the argument that the restaurants capital outlay for equipment would be prohibitive does not bear scrutiny, when you consider the return on the investment. Typically a 5 gallon container of fountain syrup costs approximately $30.00, and the average return per container is approximately $300.00, leaving a profit of over $270.00 per container. The average cocktail lounge uses in excess of 300 gallons of syrup per year. This translates into a profit of over $16,000 from their soft drink sales. Historically, cocktail lounges are the smallest users of fountain syrups.

Addressing a similar comment made by Mr. Griggs, "If the soft drink industry is forced to abandon its current program, smaller retailers, unable to take advantage of such programs, must suffer higher costs and thereby lower returns, or utilizing cheaper, inferior equipment, and further loss of quality control." This is an absurd statement, even when using Mr. Grigg's statistic that 85% of all accounts buy less than 1500 gallons of syrup per year. If we estimated the average volume of syrup sales in restaurants, coffee shops, sandwich shops and fast food outlets at approximately 750 gallons per year, and applied the same cost and retail sales analysis from above, the net return would be $20,625 per year. Hardly a credible argument for not being able to afford the purchase or lease of equipment.

Moreover, Mr. Griggs' statement does not support Coke and Pepsi's original concept of the free equipment programs aimed at the higher volume outlets. Prior to these programs and until recently, the smaller outlets survived without free equipment. More realistically they (Coke and Pepsi) now have all of the high volume business and they're shutting out competition at every level.

Mr. Gorman's argument regarding quality of products being dispensedshould operators have to pay for their own equipment is without merit. Our industry sells, services, and leases equipment. It is in our best interest to satisfy our customers, similar to any industry, ie. auto dealers, appliance stores etc.

Most lease agreements in our industry cover full service and maintenance, and the restaurateur can lease the right equipment for his restaurant for a fixed monthly rate, without being obligated or tied to a particular product line.

Whether or not S.114 singles out dispensing equipment is not the issue. S.114 is neither unique nor anti-competitive. In fact it will enhance competition in a market that is rapidly becoming the exclusive domain of just two companies. The practices that S.114 will eliminate, Congress found objectionable with respect to alcoholic beverages in 1935 when it enacted the Federal Alcohol Administration Act, 27 USC Section 205. Further, Wisconsin has enacted legislation which prohibits the giving away or loaning of soft drink equipment, and California law makes it an unfair trade practice for the Dairy Industry to give away equipment, (California Food and Agricultural Codes, Art. 4. Section 61375 (A)).

I would also like to rebut the testimony given by Mr. Griggs speaking in his capacity as Chairman of the National Soft Drink Association (N.S.D.A.). Many of us who have testified in favor of S.114 are members of the N.S.D.A., and as members we have not been asked to express an opinion or vote on an opinion regarding S.114.

Mr. Griggs did state that the opinion of his bottler members was not unanimous regarding S.114. While he would have liked the Senate Committee to believe he speaks on behalf of his membership, his testimony was only a description of what his own company does in New England, and a single relatively "new" program that his company is offering to its customers. He did not discuss any Pepsi-Cola programs or, programs of any other N.S.D.A. member.

Although, Mr. Griggs testified that 35% of the fountain equipment is loaned, I believe his figure is way off the mark. Most industry information available today would put loaned or free equipment at over 50%. This in itself is a serious problem. And worse yet, they (Coke and Pepsi) are not satisfied and will inevitably target the balance of the market for free equipment.

Thank you, again, for this opportunity to be heard. The livelihood of thousands of people and hundreds of small business are relying on our government to keep competition alive, protect us against unfair competition, and give the consumer freedom of choice. Your interest in these concerns is greatly appreciated.

Sincerely,

H. Ronald Harris

H. Ronald Harris

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March 26, 1990

The Honorable Howard M. Metzenbaum
Chairman
Antitrust, Monopolies and Business
Rights Subcommittee
Room 308 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

Mr. Brook E. Jason and Mr. H. Ronald Harris would like to jointly answer the questions of Senator Thurmond, relating to their testimony in support of S.114 on February 20, 1990, and they have asked me as counsel to submit their joint response to you.

Initially they want to emphasize that the companies sustaining the most injury from the activity that would be proscribed by S.114 sell, lease and rent soft drink dispensing equipment and sell fountain syrups. However manufacturers of the dispensing equipment and manufacturers of competing syrups such as 7-UP, Royal Crown Cola, Canada Dry, Dr. Pepper and the many generic syrup manufacturers are also being seriously harmed by the equipment give-away programs.

1. How many companies in the United States engage in the selling or leasing of soft drink dispensing equipment?

Response.

Approximately 350 companies, as their primary business, rent, lease and sell soft drink dispensing equipment. In excess of 1000 food service equipment companies sell soft drink dispensing equipment, but not on a regular basis.

There are also more than 1000 companies that formerly sold, leased or rented soft drink dispensing equipment, but because of the equipment give away programs of Coca Cola USA and Pepsico they are now reduced to selling equipment service only.

2. Have any of you pursued an antitrust claim or brought any legal action against the soft drink manufacturers concerning the practices you have described today, and if not, why not?

Response.

Approximately six years ago a group of companies that sold or leased dispensing equipment conducted extensive discussions with two prominent antitrust law firms and explored the cost and likelihood of success of bringing an action under one of the existing antitrust statutes.

Both law firms gave their opinion that a strong case could be made for proving a violation under the Sherman Act and/or the Robinson-Patman Act. Each law firm was of the opinion that Coca Cola and Pepsico would seek refuge by defending such a suit on the ground they are merely meeting each others competitive challenge -- the so-called Cola war defense. They would argue that the resultant destruction of that segment of the fountain industry which traditionally sold and leased equipment and sold non Coca Cola or Pepsi Cola syrups was merely an unavoidable fallout from the war between the goliaths. The fact that the consumer is, for all intents and purposes, now limited to fountain soft drinks made by Coca Cola USA or Pepsico is also a consequence of their give away program.

The antitrust lawyers recommended that any lawsuit brought against Coca Cola USA and/or Pepsico would be stronger if filed by one or two companies that service a relatively well defined region which could be viewed as a discrete relevant market. Obviously such an approach would create two major problems for the equipment dispensing industry. First the cost of maintaining an antitrust lawsuit is very high and would have to be born by one or two companies who may have very limited resources. Secondly it would be necessary to file several lawsuits in the various relevant markets in the United States to remedy the problem nationally.

Thus the remedy of antitrust litigation was unavailable to the members of the industry already suffering financially, because of the prohibitive cost.

3. Do any of you believe that the larger soft drink manufacturers are trying to drive you out of business?

Response.

Originally we did not think so, but today many in the industry believe both Coca Cola USA and Pepsico view the give-away program as more than a mere competitive tool directed against one another.

In the early days of the give-away program the distribution of Coca Cola syrup products was divided between independent companies such as those who make up the Committee to Eliminate Equipment Give Aways (CEEGA) and the so called Coke Bottlers. The independent distributors often carry a complete line of syrup products that might include Coca Cola plus competing syrups. Coke Bottlers, many of whom were independent of Coca Cola USA, were exclusive Coca Cola Bottlers. Many bottlers were owned by the parent company. Today, whenever possible, Coca Cola USA directs all their business towards companies controlled by them or through their own bottling network. Recently Coca Cola USA created a new corporation, Coca Cola Enterprises, which is actively buying up previously independent Coca Cola Bottling Companies and now owns approximately fifty percent of Coca Cola distribution nationwide. Its marketing programs appear to be designed to further a goal of completely controlling the fountain distribution market. Very recently Coca Cola created a sales program designed to provide discounted syrup prices to those independent distributors who will agree not to sell any competing cola product. Thus sending a clear signal to the independent distributors that if they elect not to become an exclusive Coca Cola distributor their competition can undersell them at the retail level.

Pepsico has historically operated its fountain syrup distribution through a wholly owned bottling network. Independent distributors can buy their Pepsico syrup products from a Pepsi bottling company which also sells directly to retail establishments.

Both major companies originally directed their equipment give-away programs exclusively to the large syrup buyers, such as fast food chains, hotels and institutional buyers. Today they are giving equipment to the so called "mom and pop" bars, taverns, and restaurants. By driving our industry out of business, Coca Cola and Pepsi Cola can effectively eliminate all fountain sales of competing syrups.

4. What impact would this legislation have on the price of soft drinks to the consumer?

Response.

This question is difficult to answer. There can be no doubt that the cost of equipment give-away programs by Coca Cola and Pepsico is reflected in the price of their syrup products. The difficult questions are (i) whether a termination of the give-away programs would result in lower Coke and Pepsi syrup prices to the retailer, i.e. restaurants and hotels, and (ii) would lower wholesale syrup prices to the retailer translate into lower soft drink prices to the consumer.

In our opinion approximately fifty percent of the beverage dispensing equipment currently in use by restaurants, hotels, bars and institutions has been loaned or donated by Coca Cola USA or Pepsico. Notwithstanding this net savings to retailers of fountain soft drinks, we have found no reflection of the free equipment in lower prices to the consumer.

We have no doubt that the give-away programs have caused wholesale syrup prices to increase substantially over the past few years. The ingredients for a gallon of syrup cost about $1.50 and the wholesale price is now $5.50. This price has increased dramatically. Originally the manufacturers claimed the increase was due to higher sugar prices, but the price of sugar has been stable for the past few years. As the price of syrup has increased so too has the marketing rebate to retailers. This rebate is then used by Coca Cola and Pepsico to offset the loan of free equipment. Thus if the give-away programs were made an unfair trade practice, the manufacturers would be able to lower their wholesale syrup prices to all retailers and such savings could be passed on to the consumer.

While we cannot assure you that the retail price of fountain soft drinks will decrease, we are convinced, however, that more competition in the selling and leasing of beverage equipment and the sales of soft drink syrups to retailers will ultimately benefit the consumer in terms of product selection. Increased product availability may well lead to lower prices for the consumer. On the other hand a market controlled by only two manufacturers will most assuredly not benefit the consumer or result in lower prices to the consuming public.

Sincerely,

Stanley I. Bregman

Senator METZENBAUM. Let me ask any one of you, let us assume that Coke or Pepsi came to a retailer and said we will give you a 25-percent discount if you will carry our products exclusively. Is this different than that? Does anyone care to answer?

Mr. JASON. I am not sure I understand your question.

Senator METZENBAUM. The question is a very simple one, and that is what if Coke or Pepsi came to one of the outlets and said we want you to carry Coke products exclusively; we will give you a 25-percent discount.

Mr. JASON. Off the purchase price of the syrup?

Senator METZENBAUM. Sure.

Mr. JASON. In lieu of loaned or free equipment, or in addition to?

Senator METZENBAUM. We don't even talk about free equipment. We just—if you will sign a contract with us to use our products exclusively, we will give you a 25-percent discount.

Mr. IMBESI. Mr. Chairman, may I answer that?

Senator METZENBAUM. Sure.

Mr. IMBESI. They are doing that currently. They are doing that currently with fast-food chains, and they don't say exclusively. They word it—they say, will you use our core brands, and they will name three, four or five, as many as six brands that they could use. And they will say, if you use these brands, what we will do is we will give you additional cents on all gallons. You are using two brands or three brands now. If you step it up to four brands, five brands, or six brands, we will give you additional cents on all gallons. They are currently doing that.

Senator METZENBAUM. If they gave the same discount to all stores, would that be improper?

Mr. IMBESI. If they gave it to all stores, it probably would not, but they don't give it to all stores. They pick out selected segments and selected customers.

Senator METZENBAUM. Do any of you give any equipment to your customers or any special deal on the equipment that you have available with any tie-in as far as syrup is concerned or product is concerned?

Mr. HARRIS. May I answer that, Mr. Chairman?

Senator METZENBAUM. Yes.

Mr. HARRIS. I do business in the State of California and it is illegal in the State of California to tie product to any other type of contract. Consequently, we rent our equipment independent of the selling of or supplying of fountain products.

But, yet, our competition, on the other hand, by giving away equipment, kind of side-steps that so-called law because there is no law currently to protect us in the fountain market in California that includes the giving-away of equipment.

The dairy industry was stopped from loaning or giving away equipment in the State of California, as it was in other States many years ago because of the same practice that is now taking place in the fountain market.

Senator METZENBAUM. Let me ask you this. Let us assume we pass this law, and I am legal counsel for Pepsi or Coke. Could I tell them that we ought to charge some nominal fee; we just ought to make the fee a very nominal one? Nobody is in a position to tell us we have to charge $600 a year. You could charge $60 a year and

that would be perfectly legal. What would be your response to that?

Mr. JASON. I would like to answer that. I think unless there is some stipulation that there is fair market value received for the merchandise that is placed on location, what will happen is the kind of thing that happened in Connecticut back 3 years ago, which was a very real issue.

We had a local bottler who was purchased by a conglomerate bottler out of New York State. It was no secret; it was common knowledge through the equipment suppliers that the parent company, Pepsi-Cola, supplied a massive amount of money for them to go out to the marketplace with equipment.

There was a warehouse full of equipment, of fountain-dispensing equipment, and the charge was to the sales people on the street for Pepsi-Cola, get it out there, whatever it takes. If you have to sign a contract for a dollar a year, sign it for a dollar a year, but get the equipment out there because we are not in the fountain business now and that is the only way we are going to get into it.

So without charging some reasonable value to get a decent rate of return, whether it is a dollar a year or a dollar a month, again, if it doesn't return the investment in a reasonable period of time, it doesn't make a whole lot of sense.

Senator METZENBAUM. How much do you charge a year for equipment?

Mr. JASON. It varies on the amount of equipment that we install on an account. It can be anywhere from $500 to $2,000 a year, depending on the number of dispensing stations.

Senator METZENBAUM. Give me the relationship of the annual charge as compared to the cost of the equipment itself, the sales price.

Mr. JASON. An identified dispenser that you might see in a luncheonette with a Coca-Cola or Pepsi-Cola trademark on it—we ordinarily get approximately $700 a year. The total equipment package required to make up a complete system is worth approximately $1,500.

Senator METZENBAUM. So if I am Pepsi-Cola—and you say charge a reasonable market price—it sounds to me, sitting here, that $700 is a very high charge as against the $1,500 retail price. Now, I am Mr. Pepsi or I am Mr. Coke, and I say, well, for $1,500 we can get by with charging $150 a year very easily. Actually, we can make out on that because the cost of our money is 7 percent. We buy money pretty cheaply, and 3 percent goes for amortization and this equipment lasts a tremendously long time. What do you say to that?

Mr. JASON. As a practical matter, the equipment has a life of anywhere between 5 and 7 years. Realistically, you can anticipate providing service to the equipment usually after the first year, and I would suggest also that no bottling company or parent company operation would make an investment in manufacturing equipment,

let us say, to manufacture the product itself with a long-term pay-out like that. That would not be good economics. So I would question the validity of that kind of a pay-out on a piece of fountain-dispensing equipment, other than to get identification.

Senator METZENBAUM. I guess my only point is I am not saying what the price should be or shouldn't be, but it seems to me that we open the door to some legal arguments on the part of Pepsi and Coke as to what is fair market value. And I am not sure that this legislation solves the problem, and I am not sure it doesn't need some further legal attention if you are going to actually solve the problem because, absent that, I think that you may just be back again in 2 or 4 years.

Mr. Bregman, did you want to say something?

Mr. BREGMAN. No, sir. I believe that we can tighten up the issue of fair market value.

Mr. HARRIS. Senator, I would like to address one thing about your question regarding pricing and costing. Mr. Jason referred to a cost of a piece of equipment, or renting it for $700 a year, maybe costing $1,500. The rental of the equipment historically in the industry includes service, maintenance, and parts.

The records indicate throughout the industry that the average restaurant renting a piece of equipment is going to have a minimum of three calls per year. Obviously, with escalating costs on an ongoing basis year after year with inflation, and what not, and labor and material, parts, and so on, our costs in the equipment continue to rise through the years.

So even though we might see a return on our original investment in, like, a 24-month-type period, we have this ongoing cost with the maintenance factors. It is not like an automobile, I would say, where you rent the automobile not including any type of service; you just rent the car, as an example, and then you pay for all the extras.

This industry, because of the type of industry we are, offering service night and day, and that sort of thing, weekends, and so forth, the customer wants in most cases all of that service included in his package. From the competitive nature of what has happened in these free giveaway programs, we are also seeing free service implied on top of that.

Senator METZENBAUM. Thank you very much. We appreciate this panel's cooperation and testimony. We look forward to working with you.

Mr. BREGMAN. Thank you, Mr. Chairman.

Mr. HARRIS. Thank you, sir.

Senator METZENBAUM. Our next panel consists of two men: Mark Gorman, senior director for government affairs of the National Restaurant Association, and Alfred Griggs, chairman of the National Soft Drink Association, both of Washington.

Mr. Griggs, do you want to proceed?

STATEMENT OF A PANEL CONSISTING OF ALFRED L. GRIGGS, CHAIRMAN, NATIONAL SOFT DRINK ASSOCIATION, WASHINGTON, DC, ACCOMPANIED BY MARC L. FLEISCHAKER, COUNSEL; AND MARK GORMAN, SENIOR DIRECTOR, GOVERNMENT AFFAIRS, NATIONAL RESTAURANT ASSOCIATION, WASHINGTON, DC

Mr. GRIGGS. Mr. Chairman, my name is Al Griggs. I am an independent third-generation soft drink bottler in Northampton, MA. I am principally a Coca-Cola bottler, but I also——

Senator METZENBAUM. Would you pull the mike closer to you, please?

Mr. GRIGGS. Sorry. I also represent Dr. Pepper and Canada Dry, as well as four of the other top 10 soft drink brands.

I am appearing before your subcommittee this morning in my capacity as chairman of the National Soft Drink Association. NSDA is the national trade organization of the United States soft drink industry. Approximately 75 percent of the 850 soft drink manufacturers are active members of our association.

In addition, the vast majority of soft drink licensors who manufacture the concentrates and/or syrups from which soft drinks are made belong to NSDA. Our members account for more than 92 percent of the soft drinks produced annually in the United States.

I am accompanied by Marc L. Fleischaker, of Arent, Fox, Kintner, Plotkin & Kahn, who serves as antitrust counsel to the association, and we appreciate very much this opportunity to appear before you today to provide the subcommittee with NSDA's comments regarding S. 114.

Before commencing with my testimony, please note that I testified in September 1988 before the Subcommittee on the Consumer of the Committee on Commerce, Science and Transportation, also, in opposition to an identical version of S. 114. NSDA's position on this legislation remains unchanged and, in fact, was reaffirmed by NSDA's board of directors this past October. Our board represents bottlers who are representing all brand affiliations, Mr. Chairman.

Our testimony consists of two parts. I will give a brief summary of how the fountain-dispensing business operates within the soft drink industry, and then Mr. Fleischaker will detail our specific objections to S. 114.

In the early 1960's, the practice of lending dispensing equipment to retailers to enhance fountain volume began. From the mid-1960's to the early 1980's, competition in the fountain arena increased dramatically, and loaned equipment or comparable marketing programs became the standard rather than the exception throughout the industry.

Initially, the rule of thumb for loaned equipment was for every 1 gallon of brand syrup sold by the retailer, the retailer qualified for $1 in equipment value. If an account sold 450 gallons of syrup, for instance, it then qualified for dispensing equipment valued at $450, which was the cost of a typical dispenser at that time.

By 1970, with the expansion of national food service chains, retailers either were provided with loaned equipment and merchandising materials, which are menu boards, clocks, and so forth, or

were reimbursed a fixed dollar amount per gallon for annual gallons sold.

The former choice was typically preferred by independents and local chains with limited capital resources, and the latter by national chains who would use the funds to purchase equipment and merchandising materials. Consequently, most national food service outlets owned their own equipment.

In the early to mid-1980's, competition intensified in local markets, which are the independent local chains that represent the largest number of fountain outlets, but generally are characterized by lower syrup volume per outlet. Advancements in dispenser technology had resulted in much higher equipment costs, reaching $2,500 to $3,000 per unit, including the installation expense.

Due to the financial impact on these outlets of high equipment costs, coupled with lower volume, major syrup producers began either to lease dispensing equipment or to provide a bundled program, such as equipment service and syrup, for an established cost per syrup gallon.

As a Coca-Cola bottler, I am most familiar with that company's program. Beginning in 1988, Coca-Cola USA introduced the total value plan, which offers local market retailers dispensing equipment, service, and merchandising materials for a monthly fee in addition to the price of syrup.

Coca-Cola bottlers may or may not participate in this program. The company estimates that less than 20 percent of its current equipment placements is loaned equipment. As equipment in loaned equipment accounts requires replacement, the company projects that the TVP will generally replace the equipment loan program.

Today, approximately 35 percent of the fountain syrup dispensing equipment in the soft drink industry is loaned, while the other 65 percent is leased or owned by the retailer. Additionally, 85 percent of all loaned equipment is installed in accounts which buy, according to our estimate, less than 1,500 gallons of syrup per year.

If the soft drink industry is forced to abandon its current equipment program, smaller retailers unable to take advantage of such programs must suffer higher costs, and thereby lower returns, or utilize cheaper, inferior equipment and suffer lost quality control.

Fountain-dispensing equipment is often placed on a discounted basis. Retail outlets are given marketing allowances or sums paid on the basis of syrup purchases.

I see the light, sir. If I could ask you to include the entire statement of mine in the record, I would appreciate it.

Senator METZENBAUM. Your entire statement will be included in the record.

Mr. GRIGGS. Thank you, sir.

Senator METZENBAUM. In fact, all of the witnesses' entire statements will be included in the record.

Mr. GRIGGS. If I could just, to wind up, sir, say——

Senator METZENBAUM. You have enough time to sum up.

Mr. GRIGGS. OK. We bottlers, as Buddy Jason said, understand that there are different points of view on this S. 114, but our fundamental opposition, Mr. Chairman, is that we believe that any Government interference in this arena, which is a very widely prac-

ticed, competitive marketing practice, is unwarranted and would not be something we would favor, sir.

[The prepared statement of Mr. Griggs and response to questions follow:]

STATEMENT OF

THE NATIONAL SOFT DRINK ASSOCIATION

REGARDING S. 114

My name is Alfred L. Griggs. I am a soft drink bottler from Northampton, Massachusetts and am appearing before the Subcommittee this morning in my capacity as Chairman of the National Soft Drink Association (NSDA). NSDA is the national trade organization of the United States soft drink industry. Approximately 75 percent of the 850 soft drink manufacturers are active members of the association. In addition, the vast majority of soft drink licensors who manufacture the concentrates and/or syrups from which soft drinks are made belong to NSDA. Our members account for more than 92 percent of the soft drinks produced annually in the United States.

I am accompanied by Mr. Marc L. Fleischaker of Arent, Fox, Kintner, Plotkin & Kahn who serves as antitrust counsel to the association. We appreciate this opportunity to appear today to provide the Subcommittee with NSDA's comments regarding S. 114.

Before commencing with my testimony, please note I testified in September of 1988 before the Subcommittee on Consumer of the Committee on Commerce, Science and Transportation in opposition to an identical version of S. 114. NSDA's position on this legislation remains unchanged and, in fact, was reaffirmed by NSDA's Board of Directors this past October.

Our testimony consists of two parts: I will give a brief summary of how the fountain dispensing business operates within the soft drink industry and then Mr. Fleischaker will detail our specific objections to S. 114.

In the early 1960s the practice of lending dispensing equipment to retailers to enhance fountain volume began. From the mid-'60s to the early 1980s, competition in the fountain arena increased dramatically and loaned equipment, or comparable marketing programs, became the standard, rather than the exception, throughout the industry.

Initially, the rule of thumb for loaned equipment was for every one gallon of brand syrup sold by the retailer, the retailer qualified for $1 in equipment value. If an account sold 450 gallons of syrup, it then qualified for dispensing equipment valued at $450, which was the cost of a typical dispenser at that time.

By 1970, with the expansion of national food service chains, retailers either were provided with loaned equipment and merchandising materials (menu boards, clocks, etc.) or were reimbursed a fixed dollar amount per gallon for annual gallons sold. The former choice was typically preferred by independents and local chains with limited capital resources and the latter by national chains who would use the funds to purchase equipment and merchandising materials. Consequently, most national food service outlets own their equipment.

In the early to mid-'80s, competition intensified in local markets (independents, local chains) which represent the largest number of fountain outlets, but generally are characterized by lower syrup volume per outlet. Advancements in dispenser technology had resulted in much higher equipment costs, reaching as much as $2,500 - $3,000 per unit,

including installation expense. Due to the financial impact on these outlets of high equipment costs coupled with lower volume, major syrup producers began either to lease dispensing equipment or to provide a "bundled" program, such as equipment, service, and syrup for an established cost per syrup gallon.

As a Coca-Cola bottler, I am most familiar with that Company's program. Beginning in 1988, Coca-Cola USA introduced the Total Value Plan (TVP), which offers local market retailers dispensing equipment, service, and merchandising materials for a monthly fee in addition to the price of syrup. Coca-Cola bottlers may or may not participate in this program. The Company estimates that less than 20 percent of its current equipment placements is loaned equipment. As equipment in loaned equipment accounts requires replacement, the company projects that TVP will generally replace the equipment loan program.

Today, approximately 35 percent of the fountain syrup dispensing equipment in the soft drink industry is loaned, while the other 65 percent is leased or owned by the retailer. Additionally, 85 percent of all loaned equipment is installed in accounts which buy, according to our estimates, less than 1,500 gallons of syrup per year. If the soft drink industry is forced to abandon its current equipment programs, smaller retailers, unable to take advantage of such programs, must suffer higher costs and thereby lower returns, or utilize

cheaper, inferior equipment, and suffer loss of quality control.

Fountain dispensing equipment is often placed on a discounted basis. Retail outlets are given marketing allowances, or sums paid on the basis of syrup purchases, which they can use for a variety of purposes at their discretion, including such things as advertising in local publications, participation in consumer promotions which require expenditures for point of sale materials and advertising, or equipment purchases. This is a common, long-standing business practice used in a host of consumer and industrial product situations where specialized equipment is needed to merchandise products or where retailers and suppliers can cooperate on programs aimed at enhancing the value of products to consumers. It is a cost efficient, direct approach for which there is no real substitute.

Subsidizing purchases of equipment, which serves a finished beverage product to the consumer, is a prudent business policy for beverage suppliers for the simple reason that it places the burden of beverage quality and maintenance squarely on the beverage supplier. Both the retailer and the bottler/supplier have a high mutual concern for maintaining the highest quality possible for beverages at the lowest possible costs.

Mr. Chairman, the fountain dispensing business practices I have described are the results of intense competition among members of the soft drink industry. Those practices have

resulted in providing the consumers of such soft drink products the highest quality at the lowest cost in a multitude of outlets. For the Congress to mandate changes in that competitive climate would be imprudent and unnecessary government policy imposing additional costs on retailers, many of whom are small businesses, and consumers who are the ultimate beneficiaries of these practices.

Mr. Chairman, as an officer of the National Soft Drink Association, I can tell you that bottlers are not unanimous as to whether the programs I have described are beneficial to them, but the issue is whether the market is served better by intrusive federal regulation or by the free play of competition.

Mr. Chairman, Mr. Fleischaker will now present specific comments on S. 114.

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS
HOWARD M. METZENBAUM, OHIO
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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 2, 1990

Mr. Alfred Griggs
Chairman
National Soft Drink Association
1101 16th Street, N.W.
Washington, D.C. 20036

Dear Mr. Griggs:

Thanks again for testifying at the February 20th hearing.

I have enclosed additional questions from Senator Thurmond. I would appreciate it if you would answere them and return them to the following address by March 23, 1990:

Senator Howard M. Metzenbaum
Chairman
Antitrust, Monopolies and Business
Rights Subcommittee
Room 224 Dirksen Senate Office Building
Washington, D.C. 20510

If you have any questions, please do not hesitate to contact Kelly Signs at (202) 224-5701.

Again, thank you for your testimony.

Sincerely,

Howard M. Metzenbaum
United States Senate

HMM/jo

nsda NATIONAL SOFT DRINK ASSOCIATION

1101 Sixteenth Street, NW
Washington, DC 20036
202/463-6732
Telex 5101004811
Facsimile 202/463-6731

March 23, 1990

Senator Howard M. Metzenbaum
Chairman
Antitrust, Monopolies and Business
Rights Subcommittee
Room 224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

This letter is in response to your letter of March 2, 1990, forwarding to me the questions of Senator Thurmond on S.114, a bill to declare certain activities of manufacturers of soft drinks to be unfair acts or practices for purposes of the Federal Trade Commission Act. Since one of Senator Thurmond's questions is addressed to Mr. Gorman, our answers below are to two of his three questions for the panel. In the response we have set out the question first and then our answer.

QUESTION 1: Can any of you distinguish S. 114 from similar requirements which I understand are imposed on the sale of beer? I am referring to 27 U.S.C. Section 205, which is administered by BATF.

ANSWER: The vast array of federal and state statutory and regulatory controls of the industries involved in the manufacture, distribution, and sale of alcoholic beverages have evolved to address problems associated with that industry ranging from adverse health consequences to illegal domination by criminal elements. There is no analogous history of problems associated with the soft drink industry to suggest that dispensing equipment should be subject to new federal legislation.

Attached to this letter is a memorandum reviewing the Federal Alcohol Control Act and the language similar to that of S.114. I think that analysis demonstrates again the following points which are relevant to any consideration of S.114:

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1. The provisions of the Federal Alcohol Control Act were written to address specific patterns of abuse found in the alcoholic beverage industry which contributed not only to monopolistic control of retailers by others within that industry, but also to other problems in the industry before, during, and after Prohibition;

2. In addressing specific problems in the alcoholic beverage industry Congress acknowledged that the practices being regulated for this unique industry were analogous to acts already prohibited by the antitrust laws.

The prohibitions of the Federal Alcohol Control Act were the result of findings of patterns of conduct that had resulted in monopolies and/or restraints of trade which were not addressed adequately by other federal and/or state laws. No such findings have been made with respect to the soft drink industry, and the Federal Trade Commission has testified that current antitrust laws are adequate to address these issues.

QUESTION 2: What impact do you believe this legislation will have on the price of soft drinks to the consumer?

ANSWER: In the hearings on this bill in both the current and preceding sessions of Congress, there has been testimony from those ultimately responsible for the sale of soft drinks to consumers --- restaurant, tavern, and convenience store owners, for example --- that current practices in the industry benefit consumers by reducing costs associated with sales of beverages from dispensing equipment. I think it is obvious that if the cost of doing business for such operators is increased because of statutory imposition of increased prices for dispensing equipment, then consumers will ultimately have to pay the costs.

While increased consumer prices may result from passage of S.114, we believe that there also should be recognition of consumer benefits related to quality control of products sold through beverage dispensing equipment. As I testified, consumers benefit from the advances in technology made in soft drink dispensing equipment used by retailers. The inability of retailers to benefit from the support of soft drink manufacturers responding to a competitive environment could result in use of lower standard equipment and decrease the quality of the beverages sold.

We hope these answers are helpful to the Committee in its deliberations and would be pleased to provide any other information that may be useful.

Very truly yours,

Al Griggs

Alfred L. Griggs
Chairman

ALG/pjc

Federal Alcohol Administration Act Analysis for S.114 Comparison

Prepared by:

Office of the General Counsel
National Soft Drink Association
March 21, 1990

At both the 9/28/88 and the 2/20/90 hearings on Senator Inouye's soft drink beverage dispensing equipment bill, questions were raised about the similarity of the bill's prohibitions and provisions in the Federal Alcohol Administration Act (27 U.S.C. Sec. 201-212). The general question is why should the soft drink industry be treated differently than the alcohol industry?

The following is an analysis of relevant provisions and their background with appropriate commentary.

The Federal Alcohol Administration Act was approved by President Franklin D. Roosevelt on 8/29/35. It was enacted to continue federal control of the alcoholic beverage industries which had been exercised by the Federal Alcohol Control Administration. This Administration had been created by a Presidential Executive order following passage of the 21st Amendment repealing prohibition on 12/5/33 and enforced the provisions in several codes of fair competition for the alcoholic beverage industries found in the National Industrial Recovery Act. However, a Supreme Court decision (Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)) invalidated such codes as unconstitutional delegations of legislative power, and a Congressional response was necessary to continue federal enforcement.

In addition to establishing by statute the Federal Alcohol Administration as a division of the Treasury Department, the Act also created a permit system for business operations; governs competition practices; and has provisions for bulk sales and interlocking directorates. In 1940 the Federal Alcohol Administration was abolished and its functions were moved within the Treasury Department to the Bureau of Internal Revenue. The other provisions of the Act, however, are generally in effect including the competition provisions.

Section 5 of the Act regulates Unfair Competition and Unlawful Practices involving six types of practices falling into two general categories: those relating to monopolistic control of retail outlets and those relating to labeling and advertising of such beverages. The four provisions relating to monopolistic control of retail outlets by brewers and other wholesalers declare the following unlawful: (a) exclusive outlet (requiring retailer to buy from a selling party exclusively); (b) "Tied house" (inducing a retailer to purchase product to exclusion of others using certain means including ".... furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other things of value, subject to such exceptions as the Secretary of the Treasury shall by regulation prescribe ...."; (c) commercial bribery; (d) consignment sales. The other two prohibitions govern deceptive labeling and advertising.

These four provisions in Section 5 are responses to patterns of conduct in the alcoholic beverages industry which resulted in monopoly control of retail outlets and, in many instances, involvement by criminal elements. Congress responded by terminating a variety of practices which had been found to contribute to monopolization of retailers. A suggestion that such provisions should be applicable to any other industry ignore the unique public and legal policy issues involved in control of the alcoholic beverage industry and the abuses found in the industry before, during, and after Prohibition.

The House Ways & Means Committee in reporting H.R. 8870, the first version of the Federal Alcohol Control Act cited the following:

> Enforcement of liquor laws is an exceptionally difficult enforcement problem. Many factors not common to other industries exist in the liquor industry and present enforcement difficulties not commonly met with in the enforcement of other laws. The racketeering element present in the industry during prohibition is not wholly eliminated. Internal revenue taxes and customs duties afford an economic inducement to operate outside of both liquor tax and liquor control laws. The industry has been newly reestablished and is unstable in its personnel and practices. This, together with the tradition of past practices, particularly corruption and interference in politics and efforts to stimulate consumption through the "tied house" and control of retail channels, afford a poor groundwork for reliance on law observance through voluntary action or through the customary methods of enforcement. The history of the enforcement of liquor laws in this country has been characterized by widespread violations and evasions. The ease with which the products of the industry are adulterated, sophisticated, and misbranded; their relatively high value; the perishable character of many wines and malt beverages; the large distribution costs - all are extraordinary incentives to ignore requirements of law. (See, Legislative History of the Federal Alcohol Administration Act, Appendix II, pp. 136-137)

The "Tied house" provisions found in Section 5(b) address patterns of conduct which were found by Congress to include abuses which led not only to monopoly power but also contributed to "social evils" which had been prevalent both before and during Prohibition. Thus, the furnishing of equipment prohibition is part of a series of prohibited acts including the beverage seller's holding of interest in a retail license or interest in the premises of a retailer; the furnishing not only of equipment but of signs, supplies, money, or other things of value except as permitted by regulation; guaranteeing of loans or repayment of financial obligations of a retailer; and/or extension of credit to a retailer in excess of that usual and customary in the industry for the particular class of transactions.

The Senate Committee on Finance Report on H.R. 8870 cited national investigations of the industry demonstrating certain patterns of abuse as follows:

> The House bill (sec. 5) prohibited two classes of trade practices. The first class of these prohibited practices were those which tended to produce monopolistic control of retail outlets, such as arrangements for exclusive outlets, creation of tied houses, commercial bribery, and sales on consignment or with the privilege of return. The reports of the National Commission on Law Observance and Enforcement (Wickersham Commission) and of other agencies that conducted surveys of liquor enforcement problems, all indicated that control by producers and wholesalers of retail outlets through the various devices such as those prohibited by the bill has been productive not only of monopoly but also of serious social and political evils which were in large measure responsible for bringing on prohibition. (See, Legislative History of the Federal Alcohol Administration Act, Appendix IV, p.169.)

The Federal Alcohol Administration Act is part of a series of federal and state legal and regulatory controls which are unique to the alcohol industry and distinguish it from the controls exercised over any other industry in this country. Moreover, in the Report of the House Ways and Means Committee accompanying the legislation for the Federal Alcohol Administration Act, the Committee states the the practices addressed in Section 5 are analogous to those prohibited by the antitrust laws (Legislative History as above p.143). Such an acknowledgement is consistent with the views of the witnesses of the Federal Trade Commission and NSDA's antitrust counsel discussing S.114 that existing antitrust laws are sufficient to address any alleged anticompetitive practices in the soft drink dispensing equipment industry.

Senator METZENBAUM. Thank you very much, Mr. Griggs.

Our last witness is Mr. Mark Gorman.

Mr. FLEISCHAKER. Mr. Chairman, excuse me for interrupting. My name is Marc Fleischaker. I think I am listed on the schedule as accompanying Mr. Griggs, and he has said that I was going to testify, too, in conjunction with his testimony, for the National Soft Drink Association.

Senator METZENBAUM. Let us see. You are listed as accompanying Mr. Griggs?

Mr. FLEISCHAKER. Yes, sir. I am the attorney and I was going to provide some legal thoughts on the legislation from the National Soft Drink Association's point of view.

Senator METZENBAUM. We had only scheduled one witness from the National Soft Drink Association. We will be glad to accept your statement in full, Mr. Fleischaker, for the record.

Mr. FLEISCHAKER. OK.

[The statement of Mr. Fleischaker follows:]

Testimony of Marc L. Fleischaker

On Behalf of National Soft Drink Association

My name is Marc Fleischaker. I am a partner in the law firm of Arent, Fox, Kintner, Plotkin & Kahn. My firm serves as antitrust counsel to the association and I appear before the subcommittee today in that capacity. I appreciate this opportunity to present the subcommittee with NSDA's specific comments on S.114, which would amend Section 5 of the Federal Trade Commission Act. I would like to add that this is not the first time that NSDA has commented on this legislation. At a hearing held by the Subcommittee on the Consumer, of the Committee on Commerce, Science and Transportation, on September 18, 1988, my partner, Eugene Meigher, presented closely similar testimony on behalf of NSDA before the Senate Commerce Committee.

NSDA is strongly opposed to S.114. The bill is basically antithetic to the spirit of the antitrust laws. Existing antitrust laws are fully adequate to halt any equipment leasing practice that restrains competition. However, the purpose of the bill is to reduce competition, not increase it. Finally, S.114 is unclear. It is confusing and ambiguous, and it would inhibit competition in the supply of fountain equipment in a variety of ways. By potentially prohibiting any form of marketing support from soft drink manufacturers to soft drink retailers, the bill casts a large burden on competition. In a letter to the Consumer

Subcommittee of the Senate Committee on Commerce, Science and Transportation, then Chairman Daniel Oliver, of the Federal Trade Commission, reached similar conclusions.1/

1. S.114 is unnecessary.

Implicit in the proposal to adopt S.114 is the view that existing antitrust laws are somehow inadequate to deal with any anticompetitive situations that may arise in connection with the distribution of post-mix soft drink dispensing equipment. On the contrary, existing antitrust laws are fully adequate to deal with any practices in the marketing of post-mix syrup that would impair competition.

The core concern of S.114 seems to be that loaning or leasing soft drink equipment at less than "fair market value" -- however that should be measured -- is harmful. But if loaning or leasing below cost is harmful to competition, it is already illegal, both under the Robinson-Patman Act and under the Sherman Act. Power Replacements Corp. v. Air Preheater Co., Inc., 356 F. Supp. 872, 889, 897 (E.D. Pa. 1973).

Similarly, if the bill's concern is the use of free or low-cost equipment to restrict competition in the sale of soft drink syrup, that practice can be attacked under either

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1/ Letter to the Honorable Ernest F. Hollings, Chairman, Consumer Subcommittee, Committee on Commerce, Science and Transportation from Daniel Oliver, Chairman, Federal Trade Commission, November 17, 1988.

Section 3 of the Clayton Act or Section 1 of the Sherman Act, whenever it harms competition. E.g., Perryton Wholesale, Inc. v. Pioneer Distributing Co., 353 F.2d 618 (10th Cir. 1965), cert. denied, 383 U.S. 945 (1966).

Secondly, it is difficult to perceive how "giving away" fountain equipment might threaten or result in a monopoly in any line of business, but if that practice created such a threat, Section 2 of the Sherman Act is available. Any practice that is "predatory" -- that is, it restricts competition without justification -- is illegal under Section 2 if it is designed to obtain, or maintain, a monopoly. Janich Bros. Inc. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir. 1977) cert. denied, 493 U.S. 829 (1978).

Third, any unfair method of competition is prohibited by Section 5 of the FTC Act and by the numerous "Baby FTC Acts" in the states. E.g., Wisconsin Statutes, 100.30(3).

Finally, there are a variety of state and common law remedies that deal generally with unfair competition and unfair business practices. None of the statutes have thus far adopted the position that the practices that are the subject of the proposed legislation offend their unfair competition statutes.

For all of the foregoing reasons, we believe that existing antitrust laws are adequate to deal with anticompetitive conduct that might arise in connection with

the marketing of post-mix syrup and equipment. No need has been established for the passage of special legislation. Certainly no need has been established to pass legislation that is repugnant to basic antitrust principles.

2. S.114 would harm competition

S.114 departs from traditional antitrust standards in a radical way. The guiding principle of all the antitrust statutes is to preserve competition. Section 1 of the Sherman Act prohibits agreements in unreasonable restraint of trade. The substantive provisions of the Clayton Act forbid various practices that "substantially lessen competition." Section 5 of the Federal Trade Commission Act broadly declares unlawful unfair methods of competition in or affecting commerce.

In contrast, S.114 focuses on protecting competitors rather than competition. In fact, S.114 may be violated with no impairment of competition at all. A violation is possible even if no competitor is significantly injured. For example, the "injury" aspect of the bill is satisfied if any competitor is "hindered" from selling syrup to a single retailer. This test is not only different than that incorporated in the Sherman and FTC Acts, but also antagonistic to the spirit of those Acts.

A long line of court decisions, stretching back over sixty years, has held that the loan of equipment for use with an associated product is perfectly reasonable and pro-

competitive. In 1923, the Supreme Court upheld the practice of gasoline refiners leasing gasoline pumps at nominal rates to retailers provided that the pumps be used with the refiners' gasolines. FTC v. Sinclair Ref. Co., 261 U.S. 463 (1921). In 1962 the FTC found nothing improper in ice cream manufacturers loaning freezer cabinets to food stores for use only with the manufacturers' ice creams. Carnation Co., 60 F.T.C. 1274 (1962). In 1965 the Tenth Circuit Court of Appeals rejected antitrust attacks on a grocery wholesaler who loaned display racks to retail grocers, but required the grocers to use the wholesaler's goods on those racks. Perryton Wholesale, Inc. v. Pioneer Distributing Co., 353 F.2d 618 (10th Cir. 1965), cert. denied, 383 U.S. 945 (1966).

The courts have twice upheld loaned equipment programs in the soft drink industry. Sulmeyer v. Coca-Cola Co., 515 F.2d 835, 847 (5th Cir. 1975), cert. denied, 424 U.S. 934 (1976); Bayou Bottling Co. v. Dr. Pepper Co., 725 F.2d 300, 304 (5th Cir. 1984), cert. denied, 469 U.S. 833 (1984). In the Bayou Bottling case, the court stated that providing free coolers and free service to retailers was "not barred by the antitrust laws. [These practices] are competitive acts."

None of these decisions can be attacked as aberrational or novel. Instead, these decisions are consistent, long established, bedrock antitrust law. Thirty years ago, Professor Donald Turner, one of the leading

mainstream antitrust commentators, wrote that the lease of a promotional product or collateral service at low or no cost along with another product was not an illegal practice but was merely a form of non-price competition. Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 65 (1958).

There is no basis for reversing course now.

3. S.114 Is Unclear

S.114 contains a number of expressions that are not defined and that may create unfortunate results in the enforcement of the bill. I will mention just a few examples. The expression, "substantially to restrain or prevent transactions," in subpart (a)(2), is nowhere defined, but it arguably applies even to the situation where a retailer has extracted such a good deal from one supplier that the retailer wants to deal exclusively with that supplier.

Similarly, the bill comes into play whenever there is an effect "to prevent, deter, hinder or restrict other persons from selling . . . to such retailer." However, none of those terms are defined. If there is no exclusionary agreement between the retailer and its suppliers, does the unwillingness of the retailer to deal with a competing supplier "hinder" that supplier within the meaning of this bill? Or if the retailer wanted no more than one piece of dispensing equipment, would that "hinder" the other person's sales? It is not uncommon for retailers to choose to have

only one brand of dispensing equipment in their outlets. One does not have to fall back on concepts of conspiracy or monopolization to understand why retailers might make such a choice. If such a retailer's decision "hinders" a potential supplier, then the actual supplier -- simply by furnishing any of the services described in (b) -- puts itself in peril of a violation. And the violation may be found without any finding of a lessening of competition.

Subsection (b) describes certain practices as "means of inducement," which are components of the violation created by the bill. Such practices, however, have often been reviewed by the courts, and that judicial experience does not support the presumptions created by S.114 against the practices. On the contrary, the offer of free goods and services is frequently a form of competitive rivalry. Competition would not necessarily be strengthened by mandating that it take only one form -- price competition. Just as public policy does not favor suppressing such forms of competition in other industries, there is no basis for suppressing such competitive initiatives in the soft drink industry.

Subpart (b) is replete with ambiguous language whose most likely effect will be to dampen competition in the market. The phrase "below fair market value" is hopelessly ambiguous and nowhere defined. The bill does not make it clear whether the "market," referred to, is a local market, a

regional market or a national market. Moreover, the concept of "fair market value" implies "me-too" pricing, since it evidently departs from antitrust concepts like below-cost pricing. Similarly, encouraging a limitation of credit to a period that is "usual and customary" is an invitation for competitors to go along with the least competitive suppliers in the market. The likely effect of S.114 is to eliminate the offer of credit terms as an element of competition. If competitors were to agree to refrain from offering credit beyond a certain term, they would be indicted. The bill achieves the same effect.

S.114 would also bar soft drink companies from providing signs, money, or services of any kind to retailers. Thus, all cooperative advertising and all joint promotions and marketing efforts involving soft drinks would be effectively prohibited.

For all of these reasons, NSDA urges that S.114 be defeated.

Senator METZENBAUM. Mr. Gorman.

STATEMENT OF MARK GORMAN, SENIOR DIRECTOR, GOVERNMENT AFFAIRS, NATIONAL RESTAURANT ASSOCIATION, WASHINGTON, DC

Mr. GORMAN. Thank you, Mr. Chairman, and thank you for allowing the National Restaurant Association to testify this morning on S. 114. The National Restaurant Association is the leading trade organization for the food service industry. Our industry comprises over 600,000 units across the country.

I would like to begin by providing a little background on the food service industry. We are mostly eating and drinking places. Most of us are small businesses. About 70 percent have annual sales of less than $500,000. The average profit margin in our industry is less than 5 percent, so you can see it is a tough and highly competitive business.

We would like to testify today not so much as antitrust experts or on the antitrust aspects of this legislation, but on the economic impact on the restaurant industry, should the legislation pass.

We oppose S. 114 for a number of reasons. We are particularly concerned with the bill's economic impact on operators and its likely effect on the quality of the products that we serve, and the fact that it singles out just one among many similar promotional tools that are used either with restaurants, grocery stores, or with other consumer products.

Senator METZENBAUM. What percentage of your members would you think are getting free equipment now?

Mr. GORMAN. Pardon me, sir?

Senator METZENBAUM. What percentage of your membership is presently getting free equipment?

Mr. GORMAN. I am sorry I couldn't say. I don't have the answer. I can try to get it for you.

Senator METZENBAUM. Has the position that has been arrived at been arrived at on the basis of a convention vote or board of directors vote?

Mr. GORMAN. I don't believe our board of directors has directly taken up the issue, but it is in a——

Senator METZENBAUM. How did you arrive at the——

Mr. GORMAN. Pardon me, sir?

Senator METZENBAUM. How did you arrive at the conclusion that the National Restaurant Association opposes this legislation?

Mr. GORMAN. Certainly, in consultation with members of our board, but we have not put it to the board for a specific vote.

Senator METZENBAUM. So there has not been a vote of your board, is that right?

Mr. GORMAN. Yes, sir.

Senator METZENBAUM. And there has not been a vote of your convention members and there has not been a vote of your general membership?

Mr. GORMAN. That is correct, Senator.

Senator METZENBAUM. The reason I ask these questions is because I had gotten the impression from the earlier testimony that the free equipment provided by Pepsi and Coke was, in the main,

provided to the majors, to the larger operators, and that the smaller operators didn't have it available in the past, but that there was some effort being made at the present time to spread out to the smaller operators.

And the reason I am asking the question is it would seem to me that—I think you said you have 600,000 members. Is that the figure?

Mr. GORMAN. Over 600,000 restaurants in this country, yes, sir.

Senator METZENBAUM. And how many members in the National Restaurant Association?

Mr. GORMAN. The Restaurant Association represents about 150,000 restaurants.

Senator METZENBAUM. It would seem to me that that large group of members—many of them would not be that happy with this situation because they see their competitor, McDonald's or Wendy's, or whatever, getting free equipment and they aren't presently getting it, although it may be—and they don't know that it is in the minds of Pepsi and Coke to get it.

That is the reason I am raising these questions with you, Mr. Gorman, as to really whether it does represent the position of the restaurateurs of this country.

Mr. GORMAN. Well, I appreciate your bringing that point up. First of all, we do not take up every issue that concerns the industry for a specific vote of our board of directors because there are many, many issues that we are involved with.

Senator METZENBAUM. How do you know it is their decision?

Mr. GORMAN. Well, in consultation with many of our board members, Senator. We do informal polling of our board, and our board is dominated by smaller restaurant operators, independent restaurant operators. While we do have representation among some of the large restaurant chains, of course, our membership is certainly dominated by what you call the mom-and-pops, and they are beneficiaries, as well as the larger chains, in the promotional efforts of those soft drink manufacturers that we are talking about today.

Senator METZENBAUM. This committee would be interested in a mail poll of your 150,000 members as to whether they are for or against this legislation.

Mr. GORMAN. Well, I will——

Senator METZENBAUM. If you are opposed to a piece of legislation, it is hard for me to believe you don't have a board of directors meeting. It is further hard for me to believe that all the members aren't given a chance, in an issue as important as this, to express their views.

So I don't say it facetiously at all. It doesn't cost a hell of a lot of money to do a 150,000 mailing with the mail-back cards. This is what the bill would do. Are you for it or against it? I would like to know the results of the poll.

Mr. GORMAN. Well, Senator, at your request, I will be sure that this issue comes before our board of directors at our annual meeting in Chicago in May, and we will certainly be back to you on that. But, again, I would have to say we are in very close touch with our board. We have three meetings a year. We have extensive discussions of many issues and, as I said, we don't take formal polls of the membership on everything that concerns the restaurant in-

dustry that we communicate to Congress. But at your request, I would certainly be happy to be sure that that one is brought to the attention of our board.

Senator METZENBAUM. Now, I will give you some extra time to testify because I have taken your time.

Mr. GORMAN. Would you still like to hear what we have to say?

Well, over the last several years, Mr. Chairman, the soft drink manufacturers have provided low-cost or no-cost dispensing equipment to retailers such as restaurants. This is a legitimate marketing tool, we believe, and one that the suppliers have found to be an effective way to compete for restaurant business.

The practice is not unlike promotional incentives that are used in other industries, such as when you go to the bagel bakery and get a baker's dozen; you get 13 bagels. There are many, many types of promotions, and it only can be left to the imagination.

Prohibiting these subsidies, if you want to call them that, of dispensing equipment obviously would increase the restaurateur's capital outlays for equipment. And with advances in dispenser technology, equipment costs can run as high, I understand, as $2,500 to $3,000 per unit, which is a price that many small operators cannot afford.

Smaller operators, smaller restaurateurs who want to provide top quality soft drinks, but who are unable to absorb the equipment costs, would be at a serious disadvantage with larger, more highly capitalized operators.

Naturally, restaurant operators would want to serve their customers the best possible fountain drinks, and the financial impact of this legislation would make it that much more difficult.

Many capital-poor restaurant operators, especially those who are small or just starting up, simply could not afford to buy quality dispensing equipment, and cutting off their access to equipment loaned or provided in a package deal by soft drink manufacturers would force many of them to turn to cheaper equipment and possibly provide a less satisfying product.

Again, Mr. Chairman, restaurateurs, especially those who operate smaller restaurants, would not have the capital to invest in replacing outmoded equipment or to pay for frequent servicing. And since servicing is extremely important to meet health standards that we are required to abide by, for good reason, and to provide a quality product, these operators would be at a serious disadvantage under S. 114.

Senator METZENBAUM. Mr. Gorman, as I understood your testimony, much of the equipment supplied has gone to the larger chains and a lesser proportion to the small operators. I am curious to know what is the evidence that the small operators are getting their share.

Mr. GORMAN. Well, in having talked—as I said, not having taken a vote of all of our members, but in having consulted with our members of our board who are independents, we are just—we know that the smaller operators are benefiting from the use of loaned equipment or, as a package deal, syrup, equipment, and servicing.

Clearly, the soft drink manufacturers have used that as a tool to compete for business among the chains, and including volume dis-

counts, I am sure. Senator, I just have to get back to you with numbers, if that is what you are asking for.

Senator METZENBAUM. Take another minute, Mr. Gorman.

Mr. GORMAN. OK. Well, I guess one other point I wanted to make, Senator, before wrapping up was that we feel that S. 114 unfairly focuses on soft drink dispensing equipment. The legislation completely ignores common but similar promotional subsidies, such as, you know, water dispensers for bottled water; ovens for point of sale; sandwich-heating; coffee services, which you, I am sure, have in your office, that include the coffee pot and the delivery of the coffee on a periodic basis; racks in supermarkets to display potato chips and other snacks. They are all of a similar type of promotion.

I think a logical extension of this bill would entail regulation of all such commercial promotions, and would ultimately limit competition as opposed to enhance competition.

With that, Senator, I would conclude my testimony and promise to get back to you on some of the other issues which are of interest to you and your committee.

[The prepared statement of Mr. Gorman and response to questions follow:]

1200 SEVENTEENTH STREET, N.W., WASHINGTON, DC 20036-3097 202/331-5900 FAX: 202/331-2429

NATIONAL RESTAURANT ASSOCIATION

STATEMENT OF
MARK GORMAN
SENIOR DIRECTOR, GOVERNMENT AFFAIRS
NATIONAL RESTAURANT ASSOCIATION

BEFORE THE
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS
ON
S. 114

February 20, 1990

Statement of Mark Gorman
National Restaurant Association
February 20, 1990

Mr. Chairman and members of the subcommittee: Thank you for this opportunity to share the views of the National Restaurant Association on S. 114.

My name is Mark Gorman. I am the senior director of government affairs for the National Restaurant Association. The association is the leading trade organization for the foodservice industry, an industry comprised of over 600,000 units across the U.S.

To begin, let me provide some background on the foodservice industry. Most eating and drinking places are small businesses. Fully 70% have annual sales lower than $500,000. The average profit margin in our industry is less than 5%. It's a tough, highly competitive business.

The National Restaurant Association opposes S. 114 for a number of reasons. We are particularly concerned with the bill's certain economic impact on operators, its likely effect on the quality of the products we serve our customers, and the fact that it singles out just one among many similar promotional tools for prohibition.

Over the last several years, soft drink manufacturers have provided low-cost or no cost dispensing equipment to buyers. This is a legitimate marketing tool, and it is one that suppliers have found to be an effective way to compete for restaurant business. The practice is not unlike promotional incentives used in other industries, such as volume discounts and even the familiar baker's dozen.

Effect on cost

Prohibiting cooperative subsidies of dispensing equipment would obviously increase restaurateurs' capital outlays for equipment. With advances in dispenser technology, equipment costs can run as high as $2,000 per unit, a price many small operators cannot afford.

Restaurateurs who want to provide top-quality soft drinks but who are unable to absorb the steep equipment costs would have little choice but to pass the costs on to their customers in the form of higher prices.

Effect on quality

Naturally, restaurant operators want to serve customers the best fountain drinks possible. The financial impact of this legislation would make that much more difficult.

Many capital-poor restaurant operators, especially those who are small or just starting up, simply could not afford to buy the best dispensing equipment. Cutting off their access to cooperative subsidies from soft drink manufacturers would force many of them to turn to cheaper equipment that provides a less satisfying product.

And restaurateurs -- again, especially those who operate smaller restaurants -- would not have the capital to invest in replacing outmoded or obsolete equipment, or to pay for frequent servicing. Recognizing the extreme importance of health standards and the desire to provide a quality product, operators would be hard hit by the constraints of S. 114.

Quality equipment and proper servicing, critical to delivering good fountain drinks to our customers, are often included in the total package offered by soft drink manufacturers for a fair per-syrup-gallon price. These incentive programs have been important to us in delivering a high-quality product, as have the continued research and development funds that manufacturers continuously invest in improving soft drink equipment.

Why single out dispensing equipment?
Finally, S. 114 unfairly focuses on soft drink dispensing equipment. The legislation completely ignores the common use of similar promotional subsidies. What about bottled water dispensers? Ovens for point-of-sale sandwich heating? Coffee services? The racks supermarkets use to display chips and other snacks?

The logical extension of this bill would entail regulation of all commercial promotions and would ultimately limit all competition to purchase price alone.

In conclusion, the National Restaurant Association urges you to consider S. 114's economic impact on small businesses and on consumers. We ask you to weigh the adverse effect that increased costs will have on product quality, as well as the fairness of singling out and prohibiting one legitimate promotional activity while allowing many others.

Thank you for this opportunity. I would be happy to answer any questions.

Leading the Foodservice/Hospitality Industry
1200 SEVENTEENTH STREET, N.W. WASHINGTON, DC 20036-3097 202/331-5900 FAX: 202/331-2429
NATIONAL RESTAURANT ASSOCIATION

March 22, 1990

Senator Howard M. Metzenbaum, Chairman
Antitrust, Monopolies and Business Rights Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Metzenbaum:

I am pleased to respond to the inquiries that you forwarded on behalf of Senator Thurmond regarding S. 114. The National Restaurant Association appreciates having the opportunity to address this issue both through testimony and subsequent correspondence.

If I may be of further assistance, please feel free to contact me.

Sincerely,

Mark Gorman
Senior Director
Government Affairs

Enclosure

QUESTIONS FOR PANEL TWO

1. **Can any of you distinguish S. 114 from similar requirements which I understand are imposed on the sale of beer? I am referring to 27 U.S.C. Section 205, which is administered by BATF.**

   Answer: There are indeed similarities between S. 114 and 29 U.S.C. Section 205. The statute, however, relates to alcoholic beverages, not soft drinks, which is a significant difference. Without examining the legislative history of the statute, it is evident that Congress felt a need to limit the vertical integration of manufacturers, distributors and retailers of alcoholic beverages. Perhaps by the trade practices enumerated in the statute, manufacturers or distributors of alcoholic beverages were controlling or attempting to control the operations of the limited number of retailers dispensing alcoholic beverages to the detriment of the consumers. Certainly, the criminality of the "tied house" proscriptions support that premise. We are aware of no such demonstrated need for S. 114.

2. **What impact do you believe this legislation will have on the price of soft drinks to the consumer?**

   Answer: Prohibiting the loan or discounting of dispensing equipment would increase some restaurateurs' capital outlays for equipment. Since the average profit margin in the foodservice industry is a slim 5%, some operators may be forced to offset this increase in the cost of doing business through higher consumer prices. Of course, it is impossible to predict the extent of this trend given the nature of the industry. Specifically, foodservice is a highly competitive business --not only do restaurants compete with one another, they also compete with the option to dine at home. The result of an increase in menu prices is generally a decrease in customer counts. So some operators could be forced to find other alternatives to offset the erosion of an already tenuous profit margin.

3. **Mr. Gorman, you note in your written testimony that this legislation would impact the quality of soft drinks that a restaurant operator could serve. Would you elaborate on this; are you referring to the quality of the dispensing equipment, or to the possible inability of an operator to purchase certain soft drink syrup?**

   Answer: Cutting off a smaller restaurant operator's access to equipment, loaned or provided at a reduced rate, would often force him to turn to cheaper equipment that yields a less satisfying product. Further, quality equipment and proper servicing agreements are frequently included in a package deal offered at a fair per-syrup-gallon price. Prohibiting this practice would put operators who could not otherwise afford regular servicing in a bind, and product quality could suffer.

Senator METZENBAUM. Mr. Griggs, I know you were anticipating my question.

Mr. GRIGGS. Well, Senator Metzenbaum, I would like to repeat a point which I made earlier, and that is that by our records 85 percent of the loaned equipment is to the small customer who sells less than 1,500 gallons of syrup a year. I think that in some way gets at your concern about the smaller businessman.

Senator METZENBAUM. Has the position of your organization—has there been a vote at convention or by the board?

Mr. GRIGGS. The board has voted, yes, sir.

Senator METZENBAUM. Has voted on the issue specifically?

Mr. GRIGGS. Yes, sir.

Senator METZENBAUM. I have a couple of questions. I think our concern relates very directly to the benefit to the consumer. I have seen prices in fast-food places, I have seen prices in regular retail restaurants. I haven't seen any lessening of prices. In fact, I am sort of shocked at times at what you pay for soft drinks.

What is the impact on the consumer by reason of the free equipment that is made available, either of you?

Mr. GRIGGS. Well, I think that the—if I could start, my experience as a bottler in the Northeast is that essentially our prices, our wholesale prices, have been flat for the past 5 years. And given any rate of inflationary growth that one would care to ascribe to the Northeast, I think the consumers have benefited enormously across the board by what we bottlers have done to maintain the lowest possible price for our consumer.

Indeed, this element of our business is important, and it certainly is reflected in price, but I think it is also reflected in the quality of the drink that we are providing to the consumer. And I think that is, you know, the greatest focus that we have tried to emphasis this morning, that this equipment which, as I expressed, was at the $450 per unit level is now costing in excess of $2,500. I think we are doing everything we can to maintain the lowest possible price through this program to the consumer.

Senator METZENBAUM. Mr. Griggs, you are probably aware that the brewers are prohibited by law from giving away taps and other equipment to bars. How do you distinguish that as an illegal practice from Coke and Pepsi giving away dispensing equipment?

Mr. GRIGGS. I am not in the beer business, sir, but I am sure that Mr. Fleischaker can handle that.

Mr. FLEISCHAKER. Mr. Chairman, of course, the——

Senator METZENBAUM. Pull the mike closer to you.

Mr. FLEISCHAKER. Yes. I took it as far away as I could before.

Mr. Chairman, the alcoholic beverage industry is, of course, a highly regulated industry ever since the, I think, 21st amendment was adopted, giving the States the power to regulate.

I don't believe that there is any industry which is regulated in terms of the promotional allowances they can buy other than industries where the product involves health or safety. Alcohol, of course, involves both health and safety, and, therefore, is very highly regulated both federally, and particularly at the State level.

This is not a health or safety issue that we are talking about here today. I think that is the basic way to make the differentia-

tion, in addition to the general regulation of the alcoholic beverage industry.

Senator METZENBAUM. I am not sure that fits. I am not sure that that distinction is a valid one in this particular instance.

Mr. FLEISCHAKER. Well, of course, the alcoholic beverage industry—the legislation regulates all sorts of promotional allowances, and all of it goes to the concern about alcohol, both excessive drinking and just the health impact of it.

I don't think that there is any other industry that can be pointed to where promotional allowances are specifically regulated, and the reason is, I believe, the health and safety impact of alcohol versus the rest of the industries.

Senator METZENBAUM. The Federal Trade Commission has indicated that they would like to submit a letter for the record.

[The letter referred to follows:]

OFFICE OF
THE CHAIRMAN

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

March 9, 1990

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies
and Business Rights
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Federal Trade Commission is pleased to submit these comments on S.114. The bill, if enacted, would prohibit certain promotional practices in the distribution of post-mixed soft drink dispensing equipment and soft drink syrup.

We do not support enactment of this legislation. There are four reasons for our conclusion. First, the discounting policies that the bill aims to prohibit are, in most cases, likely to be proconsumer and not anticompetitive. Second, to the extent that some of these practices may raise anticompetitive concerns, the existing antitrust laws are sufficient to deal with them. Third, the bill appears to be overbroad. Fourth, the bill as drafted contains a number of imperfectly-defined phrases that will be difficult to apply in ways that do not harm competition.

Description of S.114

S.114 would make it an unfair act or practice within the meaning of the FTC Act for any person engaged in the sale of dispensing equipment or soft drink syrup to induce retailers to purchase syrup from it, to the exclusion of other sellers, through certain promotional practices. Specifically, the bill would prohibit suppliers from offering retailers soft drink dispensing equipment (or other valuable items such as "fixtures, signs, supplies, money [or] services") at less than their fair market value, and it would also prohibit suppliers from extending credit to retailers for a period in excess of that customary in the industry. Thus the bill would prohibit firms from competing with respect to several important aspects of product distribution, such as the equipment used or the terms of credit offered.

The conduct is generally procompetitive

We believe that the conduct prohibited by S.114 generally is beneficial to consumers. The offer of dispensing equipment or other consideration is a form of a discount from the price at which soft drink syrup is sold to retailers, and therefore is a form of price competition. Some large retailers, such as fast food chains, may receive their discounts directly in the form of lower syrup prices. However, whether the discount is granted in the form of equipment, cash payments, advertising subsidies, or other items of value on the one hand, or a lower syrup price on the other, it reflects price and service competition among soft drink distributors. The fact that the discount sometimes takes the form of providing dispensing equipment at no separate charge is a creative alternative to direct price competition, and presumably reflects the preferences of the participants in the transactions. For example, food service operators would have to make larger capital outlays if subsidies for dispensing equipment were prohibited; that larger outlay would be a concern in an industry dominated by small entities with a high failure rate. Some other retailers may simply find it more efficient to obtain their syrup and dispensing equipment from a single source. Suppliers may similarly find it more efficient to provide both products at once.

In the hearings on a similar proposal in the last Congress, proponents of the bill expressed the view that the provision of subsidized dispensing equipment amounts to below-cost, or predatory, pricing. This view, however, assumes that soft drink dispensing equipment and soft drink syrup are two distinct products, and that the equipment is sold below cost and the syrup at a profit. The transactions can also be viewed as sales of two separate inputs used to produce a single final product. Therefore, firms that do not supply "free" dispensing equipment could still compete with firms that do by offering a price on syrup that, when combined with the retailer's expenditures on the purchase of dispensing equipment from a third party, yields a lower price per unit of post-mixed soft drinks. Since these non-integrated firms will not have the overhead expense of the dispensing equipment, they will presumably be able to charge correspondingly less for the syrup itself.

The manufacturers of dispensing equipment should likewise remain able to compete. These firms would be in a position to sell their products to soft drink retailers or, in any case, to the syrup suppliers. Indeed, if the challenged practices offer substantial efficiencies they could actually increase the demand for dispensing equipment.

The persons who might feel an adverse impact from "free" dispensing equipment are the distributors who previously had been marketing such equipment independently to retail outlets. That impact, however, may simply be the side effect of the greater efficiency and cost savings associated with the provision of dispensing equipment and syrup by a single supplier. A similar effect may be observed whenever vertical integration eliminates an intermediate level of distribution. Overall competition and consumers are best served by letting this process take place unimpeded.

Problems are addressed by existing laws

A second difficulty with S.114 is that any real competitive problems in this industry are adequately addressed by existing laws. We have gained experience in this subject in the course of handling several actions involving carbonated soft drink markets. We recognize that, given certain conditions, it would be theoretically possible for suppliers with monopoly power to use subsidized dispensing equipment as a means of facilitating an efficiency-reducing tie-in among various soft drink syrups.[1] We have not seen evidence of such conditions or practices in our law-enforcement activities, however.

We note, moreover, that each of the potentially harmful practices that the bill addresses already is a violation of the antitrust laws. For example, predatory pricing can violate section 2 of the Sherman Act and also the Robinson-Patman Act; tying arrangements that reduce consumer welfare violate section 1 of the Sherman Act and may violate section 3 of the Clayton Act; and agreements to foreclose competitors from access to essential inputs violate section 1 of the Sherman Act. In addition, all three types of practices violate section 5 of the FTC Act. Since these practices already are prohibited by law, there is no need to pass additional legislation to further prohibit the practices as they might take place in a specific industry.

The bill appears to be overbroad

This leads to a third issue. We believe that even if the legislation might halt some harmful practice, it would nonetheless be overbroad. The bill would not prohibit the

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[1] An unlawful tying arrangement or tie-in occurs when a supplier has a monopoly or market power in one product (the "tying" product) and uses that power to control the price or purchase terms of a second product (the "tied" product).

specified practices only when they adversely affect competition. The bill is not limited to circumstances where, in order to receive some discount, a purchaser explicitly agrees to refrain from buying from all other suppliers. Rather, it prohibits any offers that would have the practical effect of excluding any competitor from making a sale -- any one sale -- to a retailer. Imagine the case of a supplier who loans a small dispensing unit to a major restaurant that has many such units. S.114 would be violated if the seller requires that its syrup be used in its machine, even though many other dispensers in the same restaurant remain open to competition, and even though the diversion of business caused by the arrangement is too small to threaten the viability of any competing supplier. In the language of the bill, the arrangement will necessarily lead "to the exclusion in whole or in part of soft drink syrup sold or offered for sale by other persons . . . ." S.114, § (a). We believe that this aspect of the bill is overbroad, and could prohibit arrangements that are in the interests of buyers, sellers, and consumers, and that do not threaten any harm to competition.

Contributing to the overbreadth of S.114 is the fact that it will apply to syrup suppliers at all levels of the distribution chain. The preamble to the bill declares that it is aimed at the conduct of "manufacturers" of soft drinks. As drafted, however, the bill would apparently not be limited to the national syrup manufacturers, but would also govern the conduct of wholesalers, local distributors, and even the local manufacturers of specialty drinks.

The further prohibition on offering discounts in the form of signs, supplies, money, services, or credit terms is especially troublesome to us. There seems very little basis in the legislative record for this prohibition. There is little reason to believe that any of these types of discounts could be used for anticompetitive purposes, and no such reason was persuasively suggested by the hearings on the predecessor bill, which focused on the assertedly exclusionary effect of providing dispensing equipment. Again, we suggest that the offering of any one or all of these inducements is most probably a creative form of price competition.

The bill contains indefinite language

Finally, the bill as drafted contains imperfectly-defined language that would be difficult to apply without harming competition. Leasing or selling "at below fair market value" is proscribed but "fair market value" is not defined. If "fair market value" is taken to mean the price charged by others in the market, the effect of the bill would be to eliminate competition.

If "fair market value" is taken to mean some cost or profit formula set by statute or government agency decision, the effect of the bill would be to establish a form of government price control.

Extending credit to the retailer is also proscribed if it lasts for a period in excess of that which is "usual and customary." "Usual and customary" is not defined. To the extent that this phrase requires or promotes identical credit terms it would in fact be dampening a form of competition. It might also be very difficult for a creditor to comply with this requirement, because he or she is unlikely to have access to competitors' credit terms.

Conclusion

Let me just emphasize two points in conclusion. First, we do not believe that a persuasive substantive case has been made for this bill. It appears to us that most promotional loans of equipment actually represent a form of beneficial price competition, and, to the extent that residual anticompetitive problems exist, it appears that they can be adequately addressed under existing law.

Second, we are concerned about the procedural precedent that this bill might set. Most of the antitrust laws are expressed in terms of general principles, which courts or administrative agencies then apply to the facts of a particular case. To incorporate into the antitrust statutes an industry-specific directive, however, as S.114 would do, could introduce great rigidity into our national competition policy, and would be contrary to the approach that has customarily guided that policy in the past.

We very much appreciate having had the opportunity to contribute to the record in this matter. I hope you will get back in touch if we can answer any questions, or if we can help in any other way.

By direction of the Commission.

Janet D. Steiger
Chairman

Senator METZENBAUM. Senator Inouye, the sponsor of the legislation, has submitted a statement for the record which will be included immediately after the statements of any other members of this committee who want to submit a statement.

Other members on the subcommittee may submit questions for the record to the witnesses, either the witnesses of this panel or the previous panel.

Having said that, I want to thank all of the participants for helping us. The record will remain open for a period of 2 weeks. Thank you very much. The subcommittee stands adjourned.

[Whereupon, at 11:11 a.m., the subcommittee was adjourned.]

APPENDIX

February 14, 1990

Senator Howard M. Metzenbaum, Chairman
Subcommittee on Anti-Trust, Monopolies
and Business Rights
Senate Hart Office Building
Room 308
Washington, D.C. 20510

Re: Support for S. 114

Dear Senator Metzenbaum:

I respectfully request that this letter be entered as testimony in the hearings to be held on February 20, 1990.

I have spent a life career with a multi regional soft drink company, The Double-Cola Company. These forty years of selling a quality product at a consumer everyday low price have been a great adventure. They have also allowed me to see the growth of two giants in our industry, Pepsi and Coke, take a lion's share of the soft drink sales. Much of this they earned by being good marketers. This kept us all competitive, and for many years allowed companies the size of Double-Cola growth possibilities.

This business atmosphere has changed, and one of the most unfair developments has been the give away of beverage dispensing equipment. This has eliminated many strong regional brands from an earned share of consumer preference. This elimination of the opportunity to compete has not created consumer value prices but, to the contrary, has established exclusivity conditions inflating prices. This has been predatory as it has destroyed a base from which a third group can have market availability.

This smaller market share group was driven from the market by the squeezing of two giant companies using, in the majority of instances, "freebies" of equipment. This equipment was the price for an exclusive in the retail accounts for the soft drinks sold.

DOUBLE-COLA CO.-USA • 3350 BROAD STREET, CHATTANOOGA, TENNESSEE 37408
TELEPHONE: 615-267-5691 • FAX: 615-267-0793 • TELEX: 558 436 DBL COLA CTA

This is the first opportunity that I have had to be heard. The S. 114 bill before you would be most beneficial to the small independent companies that we work with as our franchisees.

Thank you for your consideration.

Sincerely,

John H Kirby

John H. Kirby
Vice President/Sales
Double-Cola Co.-USA

JHK/lf

GERALD E. MURPHY
Executive Director

NLBA

Telephone
(703) 671-7575
FAX
(703) 845-0310

NATIONAL LICENSED BEVERAGE ASSOCIATION
4214 King Street, West • Alexandria, Virginia 22302

February 21, 1990

Senator Howard Metzenbaum (D-OH), Chairman
Senate Antitrust, Monopolies & Business Rights Subcommittee
U.S. Senate
Room SH-308
Washington, DC 20510

Dear Senator Metzenbaum:

On behalf of the National Licensed Beverage Association (NLBA), representing retailers of alcohol beverages, we would like to request that this correspondence be included in the permanent hearing record for your February 20, 1990, Subcommittee hearing on S. 114, introduced by Senator Inouye (D-HI), seeking to prohibit certain unfair practices by soft drink manufacturers on the distribution of beverage dispensing equipment to retailers.

Mr. Chairman, the NLBA has over the past several years consistently opposed this legislation. We urge the Subcommittee not to report S. 114 to the full Committee. Contrary to contentions of the supporters of this legislation, placing soft drink beverage dispensing equipment in a tavern for no charge, or at a negligible charge, does not create an obligation to purchase the soft drink syrup from the company giving away the equipment. This is just not the case and is contrary to our retailer business practices.

While we have no industry-wide study to detail how many of the over 600,000 retailers of alcohol beverages around the country either purchase or receive free soft beverage dispensing equipment, this practice is an acceptable, normal course of doing business in today's economic environment.

NLBA believes free distribution of these types of equipment is not wrong. We understand that other retail industries receive free products from their suppliers for promotional or marketing use that S. 114 would seek to eliminate.

NLBA is also opposed to this legislation for a variety of other reasons. First of all, consumer demand from our tavern customers determines the type of soda or product mix we purchase for our businesses. Would it not be deceptive consumer practice, or

trademark violations, for a retailer to have a dispensing unit with, say for example, Coke on the outside and then purchase an inferior or other brand of soda syrup product merely to save a few cents?

It is unfair to impose on retailers the restrictive provisions found in S. 114, prohibiting inducements such as accepting signs, supplies, money, services or other things of more than nominal value. What the proponents of the bill ignore is the common practice of a soft drink supplier to assist his tavern owner or retailer in deciding what types of equipment to have in his or her establishment. It is the soft drink supplier who undertakes the research and development on improving outdated soft drink dispensing equipment. It is the soft drink supplier who keeps abreast of new technological advances in equipment for their establishment. There is no need to change this long established relationship through S. 114 between our retailer and their soft drink suppliers.

Finally, S. 114 claims to protect competition within the soft drink dispensing equipment market. To the contrary, by eliminating supplier marketing and promotional support to the retailer, it will reduce profits and hurt retailers. The real victim of this soft drink dispensing battle is the customer.

We believe, that this is special interest legislation, pure and simple. It is unnecessary, and we therefore urge this Subcommittee, the full Committee and Congress to reject S. 114 and not to report the bill out for final consideration.

Sincerely,

Gerald E. Murphy

GERALD E. MURPHY
Executive Director

STATEMENT OF DR PEPPER/SEVEN-UP COMPANIES, INC.
ON S.114
BEFORE THE
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES,
AND BUSINESS RIGHTS
OF THE
U.S. SENATE COMMITTEE ON THE JUDICIARY

Dr Pepper/Seven-Up Companies, Inc. appreciates the opportunity to submit this statement concerning important issues of competition and consumer rights in the soft drink industry. This statement focuses on two related issues, both of which involve the fundamental question of consumer choice and access by consumers to the full range of soft drink products available in the marketplace. These two issues are: (1) the practice by some major soft drink syrup manufacturers of providing soft drink fountain dispensing equipment to foodservice operators either free of charge or at reduced lease rates; and (2) what appears to be an emerging policy at the Federal Trade Commission to challenge license transfers by smaller soft drink manufacturers designed to strengthen their distribution systems. The first issue is covered by S.114; the second is a significant related issue that likewise deserves Congressional attention. We address these issues in turn.

I. GIVEAWAYS OF SOFT DRINK FOUNTAIN DISPENSING EQUIPMENT

Dr Pepper/Seven-Up manufactures soft drink concentrates and finished fountain syrups. These syrups are sold to food service operators to produce soft drinks in finished form to foodservice customers. The practice on which S. 114 focuses is increasingly prevalent among the major soft drink syrup manufacturers with which Dr Pepper/Seven-Up competes. This is the practice of "giveaways," by which those syrup manufacturers provide soft drink dispensing equipment to foodservice operators around the country, either free of charge or, more commonly, for some reduced lease rate or other form of consideration.

Typically, a major fountain soft drink syrup manufacturer will supply equipment on the condition that the recipient agree to a contractual limitation on the dispensing of competitive products. These restrictions often prohibit the foodservice operator from offering more than one brand manufactured by a competitor of the company providing the equipment. The remaining four or five fountain valves may only be used for the brands of the company supplying the equipment. This practice is common and occurs all over the country. For example, a foodservice operator may be required to serve only Coca-Cola brands, such as Coke, Diet Coke, Sprite, Fanta Orange, etc., on its Coca-Cola supplied

equipment. Alternatively, it may be free to sell one non-affiliated brand like 7UP or DR PEPPER -- but not both.

We believe these restrictions have a negative impact for consumers of soft drinks and for the bulk soft drink industry. Foodservice operators are being effectively "coerced" into choosing brands of fountain soft drinks based upon soft drink dispensing equipment considerations, as opposed to making soft drink brand decisions solely on the basis of actual consumer preference. The two principal brands manufactured by Dr Ppper/Seven-Up are among the ten most popular consumer soft drinks in the United States. Yet is is often difficult or impossible to sell our product to foodservice operators -- despite this consumer demand -- because of the operators' commitments made in obtaining equipment from the major soft drink companies in the industry.

Because regular and diet colas account for 70 % of fountain sales, and Dr Pepper/Seven-Up brands do not include a cola, we simply do not have the volume to provide free or deeply-discounted equipment in order to obtain fountain distribution for our products. More significantly, we believe that foodservice operators should make their decisions on the merits of brands, as reflected in consumer demand, rather than on the basis of attractive equipment deals. When allowed to compete on the merits -- as we do in the non-fountain market --

Dr Pepper/Seven-Up brands are demonstrably popular and successful.

The bill presently before the Subcommittee, S.114, seeks to prevent major soft drink companies from obtaining an unfair advantage in fountain distribution by providing equipment at no charge or at reduced rates. It would improve competition in both the fountain equipment and soft drink industries. Most significantly, however, it would enhance the ability of consumers to receive their favorite soft drinks. We encourage the Subcommittee to consider this issue seriously and to seek solutions to these problems.

II. THE FTC POLICY ON SOFT DRINK LICENSE TRANSFERS

A related problem raises similar concerns as to limits placed on the ability of smaller soft drink concentrate manufacturers, such as Dr Pepper/Seven-Up, to strengthen their distribution base and provide their products to consumers. This problem is the development of what appears to be a generic policy by the FTC staff challenging proposed transfers by smaller manufacturers of their local distribution licenses from weaker to more effective bottling companies.

This FTC policy, if it remains unchecked, will interfere with, rather than encourage, beneficial "interbrand" competition

among soft drink manufacturers. In particular, it will weaken the ability of smaller manufacturers, such as Dr Pepper/Seven-Up to compete with larger manufacturers in the industry. Moreover, by interfering with interbrand competition, the FTC's emerging policy undermines the policies that Congress sought to advance through enactment of the Soft Drink Interbrand Competition Act of 1980.

Twenty years of recent experience has demonstrated that Dr Pepper/Seven-Up's success as a soft drink concentrate manufacturer -- indeed, its very survival -- it critically dependent on the strength of its distribution system. The larger and more capable the local bottler, the more effective will be Dr Pepper/Seven-Up's local advertising, promotion and product distribution system. Accordingly, when opportunities arise to transfer its licenses, Dr Pepper/Seven-Up has consistently sought to shift the license to the most effective local bottler committed to promoting the brands -- even if that bottler is already handling Coke or Pepsi products. This policy has strengthened Dr Pepper/Seven-Up as a competitor in an industry dominated by a few huge manufacturers.

In enacting the 1980 Soft Drink Act, Congress sought to encourage precisely this type of interbrand competition, and sought to encourage the FTC to consider such competition in developing its policies for this industry. By its terms, the soft drink legislation authorizes the use of exclusive

territorial arrangements for bottlers if the relevant soft drink product is "in substantial and effective competition with other products of the same general class in the relevant market or markets." 15 U.S.C. § 3501.

In addition, the legislative history of the 1980 Act is clear that Congress intended both to encourage interbrand competition and specifically to overturn an FTC decision, whose effect, it was feared, would have been to stifle interbrand competition among soft drink syrup manufacturers. For example, the House Judiciary Committee Report quoted the Supreme Court case of Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), and explained that the Supreme Court "recognized that the existence of interbrand competition is the 'primary concern of antitrust law'. . . . Thus, [rule of reason] analysis cannot ignore the touchstone of antitrust theory and law -- the vitality of interbrand competition." H.R. Rep. No. 1118, 96 Cong., 2d Sess. 6 (1980). And during the floor debate on the 1980 Act, then-Senator Baker stated, "For over 75 years the soft drink industry in general and interbrand competition, in particular, have thrived . . . I am convinced that the [1980 Soft Drink Act] will promote interbrand competition and small businesses throughout the country." 126 Cong. Rec. S5279 (May 13, 1980).

Congress also found the practice of "piggybacking" -- by which smaller concentrate manufacturers, such as

Dr Pepper/Seven-Up, license the production and distribution of their products through "strong local bottlers of other brands" (S. Rep. No. 645, 96th Cong., 2d Sess. 4 (1980)) -- to be procompetitive because it promotes interbrand competition among syrup manufacturers. For example, the Senate Report noted that "[Market] entry has been facilitated by the industry practice of 'piggybacking'. . . . A number of national brands [including Dr Pepper] have been able to achieve nationwide distribution in a very short time by means of piggybacking." Id. Moreover, the Senate Judiciary Committee Report continued by explaining that without exclusive territories and piggybacking, "[a] substantial number of soft drink brands and flavors would be eliminated in local markets and even better known brands such as SEVEN-UP and DR PEPPER might not survive in many local markets . . . ." Id. at 6 (1980).

Despite the clarity of Congress' views and the economic analysis demonstrating the benefits to consumers of interbrand competition and piggybacking, the FTC staff has objected to Dr Pepper/Seven-Up's attempts to align itself with effective bottlers in local markets and thus to strengthen its competitive position against the industry giants, Coke and Pepsi. Instead, the emerging policy of the FTC staff seems to be to compel Dr Pepper/Seven-Up to use the weakest distributors, apparently in an effort to strengthen those distributors. This emerging policy has surfaced most recently in the FTC's consideration of

Dr Pepper/Seven-Up's request that it be permitted to transfer its license in Broward County, Florida to the local independent Pepsi bottler.

The FTC should be encouraged to temper its policies regarding soft drink license transfers so that appropriate attention is paid to the Congressionally-recognized and consumer-oriented goals of promoting interbrand competition among soft drink manufacturers and encouraging piggybacking.

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